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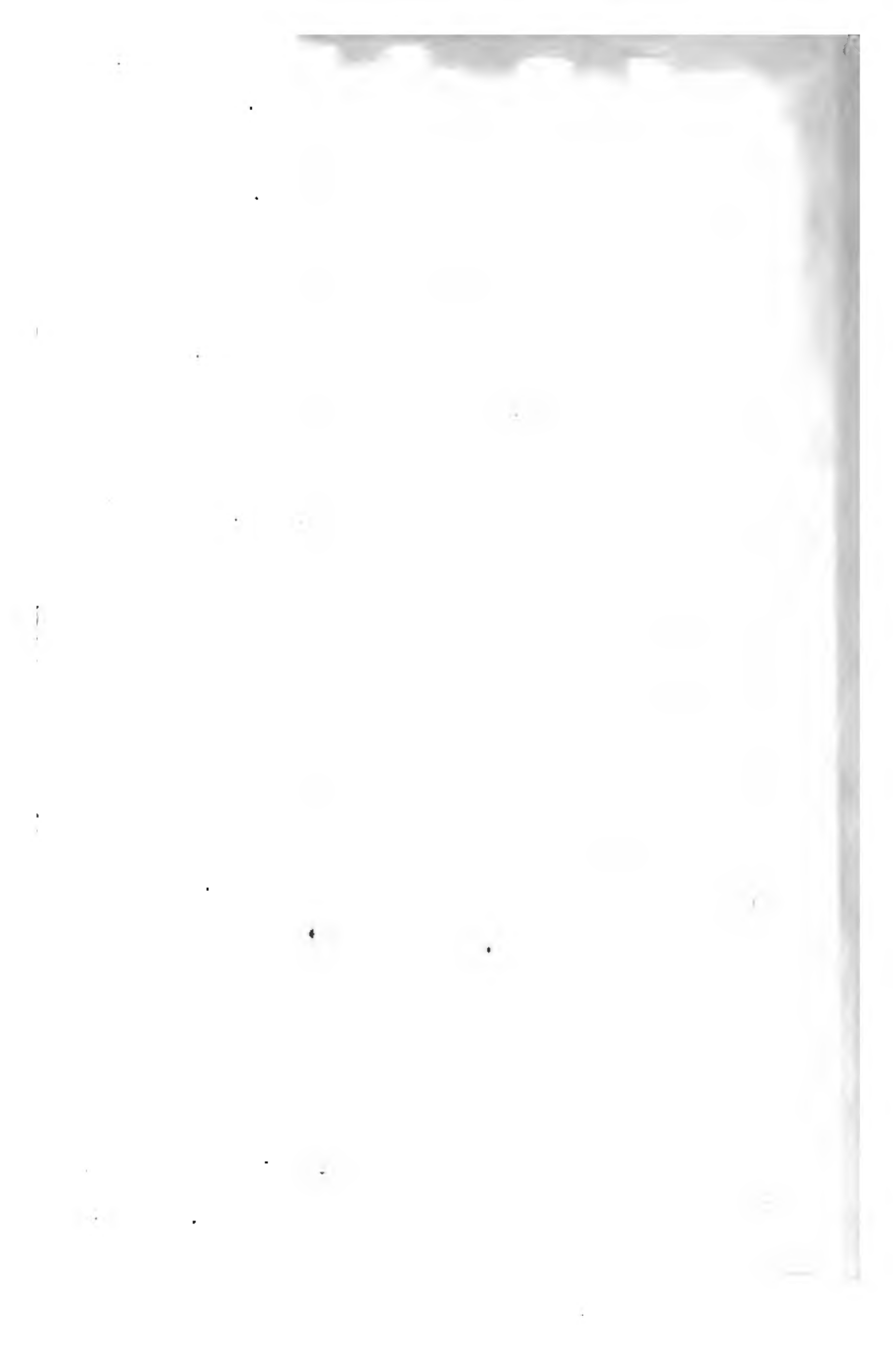
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REPORTS

OF

CASES, ARGUED AND ADJUDGED

IN THE

Court of Appeals of Maryland,

AND IN THE

HIGH COURT OF CHANCERY OF MARYLAND,

FROM

FIRST HARRIS & McHENRY'S REPORTS TO FIRST
MARYLAND REPORTS.

ANNOTATED BY

WILLIAM T. BRANTLY,
OF THE BALTIMORE BAR.

VOLUME XIII.

CONTAINING THE SECOND VOLUME OF HARRIS & GILL'S REPORTS.

BALTIMORE:

M. CURLANDER,

LAW BOOKSELLER, PUBLISHER AND IMPORTER.

1884.

References in the notes to preceding volumes of Maryland Reports are made to the pages of this edition.

The Index and Table of Cases in each volume of this series after 1 H. & J. have been prepared by Mr. W. H. BRUNE, JR., of the Baltimore Bar.

This volume, containing cases determined in the Court of Appeals of Maryland in 1827, 1828, and 1829, and reported by Thomas Harris, Clerk of the Court of Appeals, and Richard W. Gill, Attorney-at-Law, was first printed at Annapolis, by Jonas Green, in 1829.

95146

BALTIMORE:
WM. K. BOYLE & SON,
PRINTERS.

NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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Hon. JOHN BUCHANAN, Chief Judge.
Hon. RICHARD TILGHMAN EARLE, Judge.
Hon. WILLIAM BOND MARTIN, Judge.
Hon. JOHN STEPHEN, Judge.
Hon. STEVENSON ARCHER, Judge.
Hon. THOMAS BEALE DORSEY, Judge.

COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

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Hon. THOMAS BUCHANAN, “ “

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Baltimore and Harford Counties.

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Hon. CHARLES W. HANSON, Associate Judge.

Hon. WILLIAM H. WARD, “ “

Hon. THOMAS KELL, “ “ (a)

BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.

Hon. WILLIAM MCMECHEN, Associate Judge.

Hon. ALEXANDER NISBET, “ “

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THOMAS KELL, Esquire, succeeded by

ROGER B. TANEY, Esquire, appointed the 3rd of September, 1827.

(a) Appointed the 6th of August, 1827, in the place of Judge WARD, deceased.

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C A S E S
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

*** NEGRO GEORGE *et al.* vs. CORSE'S Adm'r.—June Term, 1827. 1**

On a petition by certain slaves against the administrator of J. C. with the will annexed, in which they claimed freedom, it appeared that J. C. whose property they were at the time of his death, had declared them free by his last will and testament, and thereby provided that if his personal estate, exclusive of such slaves, should not be sufficient to discharge all his just debts, then his executor or administrator might sell so much of his real estate as would pay his debts, so as to have his slaves free: that the testator's personal estate, exclusive of the said slaves, would not pay his debts, and that the administrator admitted the testator's real and personal estate, exclusive of the slaves, was sufficient to pay his debts—*Held*, that the petitioners were not entitled to freedom. (a)

(a) Examined in *Fenwick vs. Chapman*, 9 Peters, 476, where the Court said, that in the case in the text, three Judges decided to affirm the judgment upon the ground that the question of the existence of a sufficiency of real assets to pay the debts of a testator cannot be tried on an issue between the executor or administrator only, without "prejudice" to creditors, and that in trying the facts whether there be assets by descent in the hands of the heir, and what is the amount thereof, the executor or administrator has no interest, either personally, or in right of representation. These opinions failed to "command the assent" of the Supreme Court, and it was there held that in Maryland a testator may charge his real estate with the payment of his debts, to make the manumission of his slaves effective, without prejudice to his creditors; that the words "after my debts and funeral expenses are paid, I devise as follows," amounts to such a charge, and that an order of the Orphans' Court empowering an executor to sell the personal estate of a testator does not enable him to sell slaves manumitted by will, if

APPEAL from Kent County Court. The appellants filed their petition, (claiming their freedom,) against the appellee, as administrator with the will annexed of James Corse. The appellee pleaded that the petitioners were not entitled to their freedom, and issue was joined.

At the trial the following facts were admitted, viz. That the petitioners were owned and possessed by James Corse on the 13th of January, 1824, and also at the time of his death, which was in October, 1825. That the said James Corse, by his last will and testament, duly executed by him, dated the 13th of January, 1824, amongst

2 other things therein contained, bequeathed * and devised as follows: "*Imprimis*. I hereby set free all my negroes of every description, in the following manner, which is to say; the men George, David, Jim and Harry, at my death; also the women, to wit, Maria, Beck and Mary, with their issue, in case they should have issue between this time and that period, my death; and the boys as they severally arrive to the age of twenty-one, to wit, Isaac, eighteen years old, Levi, fifteen years old, Sandy," &c. "and the girls at the age of eighteen, with their issue, in case they should have issue to wit, Phillis, fourteen years old, and Sally, twelve years old. And it is hereby expressly provided, that if my personal estate, exclusive of the negroes, should not be sufficient to discharge all my just debts, then my will is that my executor or administrator, as the case may be, may sell so much of my real estate as will pay my debts, so as to have my negroes free as before stated." He then devised and bequeathed to his brother Unit Corse, and to his heirs and assigns, the residue and remainder of his estate, both real and personal, with the unexpired time of the negro boys and girls, as designated in the first clause of his will; and he appointed his said brother Unit Corse his executor. That on the 13th of January,

the real estate is sufficient to pay the debts. In *Cornish vs. Willson*, 6 Gill, 299, the Court refused to follow *Fenwick vs. Chapman*, because it was not a correct exposition of the law of Maryland, and said that the case in the text was fully entitled to the confidence of the Court. It was held in *Cornish vs. Willson*, that a charge on real estate for the payment of debts or legacies is peculiarly the subject of equitable jurisdiction in Maryland, of which a Court of law can take no cognizance, and that in a case where slaves were manumitted by will, and the personalty was not sufficient for the payment of debts equity will suspend proceedings at law, decree a sale of the realty charged with the payment of debts and apply the proceeds to their satisfaction. Creditors being thus paid, the manumitted slaves could successfully prosecute their petition for freedom.

As to the sale of the real estate of a decedent for the payment of his debts, see Rev. Code, Art. 66, sec. 1; *Ibid*, Art. 64, sec. 9; *Tyson vs. Hollingsworth*, 1 H. & J. 286; *Harwood vs. Rawlings*, 4 H. & J. 91; *Duvall vs. Green*, *Ibid*, 207; *Magruder vs. Peter*, 11 G. & J. 217. As to the charge of a legacy upon real estate, see *Crawford vs. Severson*, 5 Gill, 443; *Budd vs. Williams*, 26 Md. 270; *Addison vs. Addison*, 44 Md. 182.

1824, the said James Corse owned and possessed under the will of his father, all the lands and real estate, which had been devised to him by his father James Corse, deceased. That the will of the said James Corse, (the father,) which was duly executed so as to convey real estate, so far as the same relates to the lands devised to his son the said James Corse, is as follows: "Item. I give and devise unto my son James Corse my home dwelling plantation known by the name of Wright's Rest and Middle Neck, to him my said son James Corse, and to his heirs lawfully begotten of his body, forever. And in order that my said son James Corse should have it fully in his power to transmit the home dwelling plantation without injury down to posterity, I therefore, Item. I give and devise unto my said son James Corse one other plantation known by the name of Saint Martin's and Allebone's Addition, be the same known by whatever name or names it may, to him my son James, and his heirs, forever." That James Corse, the devisee, on the 22d of February, 1825, conveyed in fee simple to Thomas Wilson, * in consideration of the sum of \$3,248, "all those parts of tracts or parcels of land lying and being in Kent County, called St. Martin's and Allebone's Addition, which were devised to the said James Corse by his father, James Corse, deceased, by his will dated the 3d of May, 1815, except one acre and thirty-two perches, which was heretofore sold and conveyed by the said James Corse to Philip Crane, by deed bearing date the 26th of March, 1822." That Thomas Wilson on the 22d of February, 1825, conveyed in fee simple to Unit Corse and the said James Corse, as tenants in common, in consideration of the sum of \$7,108, "all that part of a tract or parcel of land situate, lying and being, in Kent County, called Cammelsworthmore, containing 20 acres of land; also all that part of a tract or parcel of land, lying and being in the county aforesaid, called Ridgely, containing ten acres, together with the grist-mill and saw-mill thereon." That the said James Corse, on the 11th of July, 1825, conveyed in fee simple to Thomas C. Kennard, in consideration of the sum of ten dollars, "all that farm or plantation of him the said James Corse, lying and being in Kent County, commonly called The Home Farm, being composed of a tract or part of a tract of land called Wright's Rest, and a tract or part of a tract, called Middle Neck, which said farm or plantation was devised to the said James Corse by his late father, James Corse, deceased." That Thomas C. Kennard on the 14th of July, 1825, reconveyed to the said James Corse, and his heirs, in consideration of the sum of ten dollars, the last above mentioned lands, which had been conveyed by the said Corse to the said Kennard. That the lands conveyed in the deed from James Corse to Thomas Wilson, were given in exchange for such part of the lands, mills and premises, as were conveyed to the said Corse by the deed from Wilson to Unit Corse and James Corse. That the said James Corse, the younger, was at the time of his death seized and

possessed of an estate in fee simple in and to the lands, called Wright's Rest, and Middle Neck, which are mentioned in the will of his father as aforesaid; and also in and to an undivided moiety of the lands, mills and premises, mentioned in the deed from Wilson to Unit and James Corse. It was also admitted that the personal

4 estate of the said James Corse, either including or *excluding his negroes, was not, at the time of the execution of his said will, and has not at any time since, been sufficient to pay his debts; but that the undivided moiety of the said James Corse, in and to the lands and premises mentioned in the deed from Wilson to Unit and James Corse, together with the personal estate of the said James Corse, exclusive of his negroes, were at the time of his death, and still are, sufficient to pay all his just debts and funeral expenses. And also that the above mentioned lands, called Wright's Rest and Middle Neck, together with the personal estate of the said James Corse, exclusive of his negroes, were on the 13th of January, 1824, and also at the time of the death of the said Corse, and still are sufficient to pay all his just debts, and funeral expenses. That the personal estate of the said Corse, including his negroes, was not at the time of the execution of his will, nor has it at any time since been sufficient to pay his debts. The counsel of the petitioners then prayed the Court to instruct the jury, that if they believed the foregoing facts, they must find a verdict for the petitioners. Which prayer the Court, [PURNELL and WRIGHT, A. J.] refused to give; but did instruct the jury, that if they believed the facts admitted, they must find a verdict for the defendant. The petitioners excepted; and the verdict and judgment being against them, they appealed to this Court.

The cause was argued before EARLE, ARCHER, and DORSEY, JJ. by *Eccleston*, for the appellants; and *Chambers*, for the appellee.

The Judges delivered their opinions *seriatim*.

DORSEY, J. In forming an opinion on this case, I have been truly sensible of the peculiar hardship of the situation of the petitioners, and have felt, as far as I consistently could do, an anxious disposition to relieve them. But, after mature reflection, I feel convinced, that this Court, on the proceedings now before them, is incompetent to grant relief.

Previously to the passage of the Act of Assembly of 1796, ch. 67, the manumission of slaves by last will and testament was prohibited;

5 * but upon this express condition, that no such manumission "shall be effectual to give freedom to any slave or slaves, if the same shall be in prejudice of creditors." Whether in case of an insufficiency of the personal estate, (exclusive of the negroes manumitted,) to pay the debts of the deceased, it be deemed

a prejudice to creditors, within the meaning of the Act of Assembly, to subject them to the delay and expense unavoidably incurred in pursuing in a Court of equity real assets, which have come to the hands of the heir by descent, I deem it unnecessary to determine. The ground on which I concur in the judgment given by the Court below against the petitioners is, that the question of the existence of a sufficiency of real assets to pay the debts of the testator never can be tried on an issue between the petitioners and the executor or administrator only, without "prejudice" to creditors. It would be an issue to which they are no party, and to protect whose interest nobody appears. As far as relates to the personalty, the executor or administrator is competent to act for all who are concerned; but in trying the facts, whether there be assets by descent in the hands of the heir, and what is the amount thereof, he has no interest either personally or in right of representation. *Virtute officii* he is neither bound to acquire, nor presumed to possess any knowledge upon the subject. With the title he is unacquainted—with the value of the land equally uninformed. Let the proof offered to establish the same be what it may, he comes prepared neither to rebut nor resist it. Sanction the doctrine contended for by the appellants, and if at any period of his life the deceased be shown to have been seized of real property, the issue will be found for the petitioners, although, if proper parties interested were before the Court, it could be made appear that he had conveyed away all his right by legal conveyances executed forty years before his death. A most exaggerated estimate of the value of the real assets may be made by ignorant or partial witnesses; yet none, whose interest it is to do so, have an opportunity of cross-examining them, or disproving their statements. The judgment of the Court having once given effect to the manumission, on the ground that effects in the hands of the heir should be applied to the payment of the debts, the executor or administrator is absolved * from all responsibility, except as to the residue of the personalty, and the creditors would be left to seek, 6 through a Court of equity, real assets, which perhaps never had an existence. Nothing was farther from the design of the Legislature, than to have authorized a mode of judicial proceeding so unprecedented, and so unjust and prejudicial to creditors.

It may be urged that the case now before us should be an exception to the general rule, inasmuch as the testator has, in the contingency which has happened, charged his real estate with the payment of his debts; and it is admitted in the bill of exceptions, that the residue of the personal, with the real property, is adequate to their payment. But this suggestion is entitled to no weight.

In the first place the testamentary charge of the debts upon the land, was revoked by the deeds of conveyance subsequently executed; and if it had not been, the effect would be the same, as the existence or value of the property charged could not be inquired into. As re-

gards the admissions by the appellee, he was wholly unauthorized to make them, and the Court was incompetent to pass judgment upon the facts they contained—not being matters in issue in the cause.

I am of opinion that the judgment of the County Court ought to be affirmed.

ARCHER, J. Although I concur in the conclusion to which the Judge, who has just delivered his opinion has arrived, I do not altogether agree with his reasoning. I do not believe the Act of 1796, ch. 67, s. 13, should be so construed as to prohibit a testator from manumitting his slaves, provided he has left real estate sufficient to pay his debts. All a man's estate, real and personal, is a fund for the payment of his debts. The former can be resorted to with as much facility in the absence of the latter, as personal property itself can. To be sure the personal estate is the first fund to which the creditor is to look; but I cannot believe if by the manumission of slaves, the personal estate is made insufficient, and the creditor is compelled to resort to the real estate for payment of his debts, that he is thereby prejudiced within the meaning of the Act of Assembly. To constitute such a prejudice, in my opinion, some loss should result * to him, which could not be the case where
 7 the real assets are sufficient.

My difficulty in the present case is that there are no parties to the record who are competent to make the admission, that the real estate is sufficient to pay the debts, when the petitioners are abstracted from the personal property. Surely the executor cannot do it. He has only to deal with the personal estate—with the real estate he has nothing to do, and is an entire stranger to it. He is not in law supposed to know either the title by which it is held or its value; nothing in relation to it coming within the scope of his legal power and authority. Were the admissions of an executor taken, creditors would be utterly insecure; they would be bound by the admissions of one who, from the character of his office, would be irresponsible to them, which would be the extremity of injustice.

Were it possible for the petitioners to ascertain the creditors of the testator, I strongly incline to the opinion that they might in equity be compelled to resort to the real estate for the payment of their debts. Of this, however, I give no decisive opinion, as the case before the Court does not demand that I should point out a remedy, but only to determine whether the law furnishes the remedy which is sought; and I am clearly of opinion it does not; for we must be satisfied that the creditors will not sustain a loss, if the petitioners are adjudged to be free, and that we cannot do in these proceedings.

EARLE, J. This is an appeal from a judgment of Kent County Court. The appellants are petitioners, claiming their freedom under the will of James Corse, and the appellee is his administrator, with

his will annexed. The verdict is against the petitioners ; and it was rendered on an agreed statement of facts, under an instruction given by the associate Judges of the Court to the jury to find for the defendant. This instruction gave rise to the bill of exceptions, which forms the present subject of inquiry. Ought the Court to have instructed the jury to find against the petitioners ?

I approach the consideration of this subject with every disposition to favor the pretensions of the appellants, as it appears to have been the earnest wish of their master, protector * and friend, that they should be free ; but in deciding on their rights, my incli-
8
nations and feelings must not induce me to overlook the interests of others. Their contention is with Thomas C. Kennard, who appears in a representative character, and whose security in the performance of his trust must be consulted. The creditors are the first objects of this trust, to whom his testator was bound to be just, before to others he could be generous. It was not in his power to confine them to a particular fund for the satisfaction of their debts, to whose demands the whole of his estate was equally liable. More particularly was it not with him, to turn them over from the natural fund, to one more uncertain, and less accessible. It is true they might resort to his real assets, agreeably to his wishes, but they had a right to call on his personal estate for payment, to the full extent of it, if they had been pleased so to do. The point then arises, whether a verdict and judgment rendered against this administrator, could have justified him to the creditors, if he had attempted to have established by proof the insufficiency of the real and personal assets, independent of the negroes, to pay the debts of the deceased, and failed in the attempt ? The plain answer to the point is, that such a proceeding would not have excused him ; because in the trial of such a question, he was not competent to act the part he assumed. With the real assets, and their sufficiency or insufficiency, he had nothing to say, and was in no way cognizant of their value or extent, and had not the means of ascertaining the one or the other. In my opinion, then, he acted the prudent part in avoiding this controversy, and by admitting the fact of sufficiency, very properly brought the question of right before the Court, who appears to me to have decided it correctly. It never could have been the intention of the Act of 1796, ch. 67, to have abrogated principles long established, by compelling creditors to look for payment to a particular fund, specified by their debtor ; nor could it have been its design to oblige them to abide by the verdict of a jury, deciding on the question of sufficiency or insufficiency of real assets, where the executor alone was a party, and they not represented in the controversy.

I think the judgment ought to be affirmed.

Judgment affirmed.

9 * SEEKAMP'S Adm'r *vs.* HAMMER *et ux.*—June, 1827.

In the distribution of the personal estate of an intestate, who died leaving a mother, a brother of the whole blood, and four brothers and sisters of the half blood, a sister of the half blood is entitled to one-sixth of that estate under the Act of 1798, ch. 101, sub-ch. 11; for the terms, "and there shall be no distinction between the whole and half blood," in the 11th section of the above Act and sub-chapter, run through the whole of that sub-chapter. (a)

APPEAL from the Orphans' Court of Baltimore County. The only question in the case was, whether or not, in the distribution of the personal estate of a deceased intestate, under the Act of 1798, ch. 101, among brothers and sisters, the half blood were entitled to share with the whole blood; or that the same was to be distributed among the whole blood, to the exclusion of the half blood? It appears by the petition filed by G. Hammer, and Caroline his wife, (the appellees,) against Frederick L. E. Amelung, administrator of Albertine C. Seekamp, (the appellant,) and the answer of the said Amelung, that Sophia, the mother of the said Caroline, was formerly married to a certain Volkman; that she had two children by the said marriage, viz. Caroline, one of the petitioners, and Amelia, her sister, both of whom are yet living; that the said Sophia afterwards intermarried with a certain Albert Seekamp, of which marriage the only issue were Albert and Albertine C. Seekamp; that Albert, the younger, is still living, and Albertine C. his sister, is now deceased; that after the death of Albert, the elder, the said Sophia intermarried with Frederick L. E. Amelung, out of which marriage two children have been born, both of whom are yet living, and were born before the death of the said Albertine C. Seekamp; that on the death of Albert Seekamp, the elder, the said Albert, his son, and Albertine C. his daughter, succeeded to a large personal property from their said father; that on the 16th of March, 1824, the said Albertine C. Seekamp departed this life intestate, and a minor, under the age of sixteen years, and that administration was granted upon her estate to the said Frederick L. E. Amelung; and, by virtue of such administration, the said Frederick L. E. Amelung became possessed of a large personal estate, as appears by his administration account rendered to the Orphans' Court; that after * the pay-

10 ment and allowance for debts, and other expenses incident to the administration, there is now in his possession, as administrator aforesaid, a large personal property ready for distribution; that the time allowed by law for making such distribution has elapsed; and

(a) Rev. Code, Art. 48, sec. 12.

the question presented to the Orphans' Court was, who were entitled to this personal estate of the said Albertine C. Seekamp, deceased?

The Orphans' Court, [M'KIM, RANDALL, and MOORE, JJ.] were of opinion, that, before the passage of the Act of 1798, ch. 101, by the General Assembly of this State, a brother or sister of the half blood were equally entitled with a brother or sister of the whole blood, of the personal estate of a deceased brother or sister dying intestate; and the Court did not see any thing in that statute, to induce them to believe that the Legislature intended to alter this law; and that if the Legislature intended to exclude the half blood from participating equally with the whole blood, of the personal estate of a deceased brother or sister dying intestate, that it would have done it in plain and express language, which is not to be found in the Act of 1798; on the contrary the Court think that the ninth section of sub-chap. 11, of that Act, intended to place them upon the same footing, and to give them the same rights in this respect; and the Court were of the opinion, that this section intended and did provide for a brother or sister of the half blood, as well as for a brother or sister of the whole blood—Decreed, that Frederick L. E. Amelung, administrator of Albertine C. Seekamp, deceased, make distribution of the personal estate of the said deceased, according to this decree, and that he pay and deliver over to the said Gottfried Hammer, and Caroline his wife, one-sixth part of the personal estate of the said Albertine C. Seekamp, deceased.

From this decree the respondent appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DORSEY, JJ.

Frick, for the appellant, contended, that in the distribution of personal estate under the Act of Assembly of 1798, ch. 101, among brothers and sisters, the half blood are not entitled to share with the whole blood; but that the same is to be distributed among the whole blood, to the exclusion of the half blood. * That the Statutes 22 & 23 of Car. II, ch. 10, and 29 Car. II, ch. 30, **11** were superseded in this State by the testamentary system, 1798, ch. 101—the point was not, therefore, susceptible of illustration by analogy or argument from British authorities, but must depend upon the phraseology of our own Act. The case before this Court is that of brothers and sisters of the whole and half blood, and if governed entirely by the 9th section of the 11th sub-chap. of the Act of 1798, ch. 101, there is nothing in the point; for that section is that “every brother and sister of the intestate shall be entitled to an equal share, and the child or children of a brother or sister of the intestate shall stand in the place of such brother or sister.” But the 11th section of that sub-chapter, which is in these words—“after children, descendants, father, mother, brothers and sisters, of the deceased, and their descendants, all collateral relations, in equal degree, shall take,

and no representation amongst such collaterals shall be allowed; and there shall be no distinction between the whole and half blood," renders it at least ambiguous and doubtful, whether such was the intention of the Legislature; and Chancellor KILTY, in *Greenfield vs. Beckett & Blake*, says, "the expressions are somewhat obscure," (a)

12 * The 11th section of the 11th sub-ch. as will be seen, after providing for children, descendants, father, mother, brothers and sisters, takes up all collaterals in equal degree, (meaning all other collaterals,) and here for the first time varies a material feature in all the former provisions; for it provides that there shall be no representation among such collaterals, and there shall be no distinction between the whole and half blood. These words, "such collaterals," must mean the last named collaterals, and if it was necessary to say, that among them, there should be no distinction of blood, it follows as a necessary and irresistible implication, that among the collaterals previously named, there must subsist a distinction. This provision then is confined to such collaterals after brothers and sisters, and is not designed as a general provision to extend to all the preceding sections. Does not the conjunction *and*, by every rule of grammatical propriety necessarily couple it with the sentence immediately antecedent; and if so, does it not exclusively apply to such collaterals as are after brothers and sisters, and expressly determine that only after them the distinction between the whole and half blood shall

13 cease? * It is remarkable too, that this Act, at least these sections, are taken almost *verbatim* from the Act of 1715, which is in a great measure transcribed from the Statutes of 22 and 23 Car. but that neither of them contain anything of the whole and half blood; and that under those statutes they share alike, not by desig-

(a) The case here referred to of *Greenfield vs. Beckett & Blake*, was on a bill filed in the Court of Chancery in 1817, by the grandchild of a sister of a deceased intestate, who died in 1802, and left no widow or issue, but left a brother and sister, the children of a deceased sister, and the child (the complainant,) of a deceased niece, claiming to come in for his share of the personal estate of the deceased. The question submitted to the Chancellor was, whether Barbara and her husband, and T. Bond and J. Beckett, &c. who survived the intestate, were not entitled in preference to the complainant, their nephew and son of Priscilla, who died before the intestate. KILTY, Chancellor, dismissed the bill. In his decree he remarked, "that the testamentary system (1798, ch. 101,) repealed the regulations in former Acts and Statutes only, so far as they were inconsistent with that Act. The Act of 1715, ch. 89, taken chiefly from the Statute of 22 Car. II, ch. 10, declared that there should be no representation among collaterals after brothers' and sisters' children. This provision remains in force, if not altered by the Act of 1798, ch. 101. I do not perceive any alteration, although the expressions in the 11th sub-ch. s. 11, are somewhat obscure. The complainant being the grandchild, cannot take *per stirpes*, because the law does not admit of such a representation, he being beyond a brother or sister's child; and he cannot take *per capita* with the brothers' and sisters' children who are nearer of kin to the intestate."

nation of blood, but under the phrase "every of next of kindred in equal degree." See 3 *Bac. Ab.* 75, and the cases there referred to. It cannot be said that the law has no such policy as is here contended for, and that the distinction is feudal and odious. What policy is there for preferring the whole blood in descents and not in distribution? See also sec. 16, sub-chap. 5, of the Act of 1798, ch. 101, where the whole are preferred to the half blood in granting administrations. What reason can be assigned for this, if the distribution is designed to be equal? The construction here contended for by the appellant, however, renders both parts of the Act compatible.

Mayer and *Latrobe*, for the appellees, were stopped by the Court.

THE COURT. The expressions, "and there shall be no distinction between the whole and half blood," in the 11th section of the 11th sub-chapter of the Act of 1798, ch. 101, run through the whole of that sub-chapter, and include the whole and the half blood. The Court do not think there is any ambiguity in that part of the Act.

Decree affirmed.

CATON vs. SHAW & TIFFANY.—June, 1827.

F. applied to S. & T. for a loan of money, which they refused without security. He then brought to them the following letter from C. "Mr. F. tells me that he is about to loan from you five hundred dollars, and wishes me to state that I will become his eventual security for the payment. This I am willing to do, as I believe Mr. F. will be very punctual, having * found him so on similar occasions." Addressed to S. & T. On its delivery they said they would have nothing to do with C. in money transactions. The letter being left with them, and their refusal not communicated to C. in a day or two after F. again applied to them for money; they lent him the sum of \$800, nothing being then said about the guaranty; they however retained it, placed it away among their evidences of debts due them, and took from F. his note for the amount of the loan—*Held*, that there was evidence from which the jury might infer, that S. & T. accepted C's letter as a guaranty for their loan to F. and that said letter was a conclusive guaranty, for the eventual repayment of a loan not exceeding the sum mentioned in it. 14

Where one makes a mere overture or offer to guarantee the transactions of another, he is entitled to notice of its acceptance before he can be held liable as guarantor: but in the case of an absolute guaranty, no such notice is necessary. (a)

A loan at par of bank notes passing at from 2 to 5 per cent. discount, unexplained by circumstances, would be usurious; but where the borrower was at liberty to return them to the lender at their par value, and so exempt himself from loss, such a transaction would not be deemed usurious, unless that privilege was a mere cover to cloak a usurious design.

(a) Affirmed in *Hutton vs. Padgett*, 26 Md. 281; *Mitchell vs. McCleary*, 44 Md. 377, and *Boyd vs. Snyder*, 49 Md. 344.

APPEAL from Baltimore County Court. Action of assumpsit. The first count in the declaration stated, that on the 29th of July, 1817, in consideration that the plaintiffs, (the appellees,) at the special instance and request of the defendant, (the appellant,) would lend and advance to Abijah Fenn such sum of money as he should have occasion for, and require of the plaintiffs not exceeding \$500, he the defendant undertook and promised the plaintiffs to stand security, and be accountable to them for such sum of money as they should lend and advance to Fenn. The plaintiffs averred that they, confiding in the said promise and undertaking of the defendant, did on the 31st of July in the year aforesaid, lend and advance to Fenn \$300, which he then had occasion for, and required of the plaintiffs. That Fenn, although requested, had not paid to the plaintiffs the said \$300, except \$23.77 on, &c. and \$50 on, &c. but to pay the \$300, except the said sums, &c. he hath refused, &c. of which the defendant had notice on the 9th of March, 1822, &c. Another count stating the same as above, and that Fenn had become an insolvent debtor, &c. The defendant pleaded *non assumpsit*, and issue was joined.

1. The plaintiffs at the trial gave in evidence the deposition of Abijah Fenn, taken on the 22d of January, 1825, by * consent
15 of parties, to be read in evidence, subject to all legal objections. He deposed, that being in want of money, on or about the 29th of July, 1817, he called on Caton, the defendant, to borrow some, having for many years had, as he still has, dealings and transactions with him; that Caton informed the deponent that he could not lend him any at that time, but that he was desirous of aiding him, deponent, and if deponent could obtain the money from any other person, he, Caton, would become deponent's security for the payment of it. Whereupon the deponent thinks that he informed Caton that the plaintiffs, Shaw & Tiffany, would lend deponent money upon his, Caton's security. Whereupon Caton wrote and signed the letter or instrument of writing hereto annexed, (marked A,) and delivered it to the deponent, which instrument of writing the deponent carried and delivered to the plaintiffs, as deponent thinks on the day of its date. That Mr. Shaw, one of the said firm, was present on the delivery of said instrument of writing, but deponent does not recollect whether Mr. Tiffany, the other partner, was present or not. That on receiving the said letter Mr. Shaw said that he knew Mr. Caton by hearsay, and as the deponent understood, said that he would not have anything to do with Mr. Caton in transactions of money, or something like those expressions, which deponent does not pretend to state exactly, as he cannot recollect. That on the next day, or day afterwards, or within a few days, as near as deponent recollects, deponent called again at the store of the plaintiffs, when both said partners were present, and upon deponent's stating to them his want of money to take up a note in bank,

becoming due, they, the plaintiffs, opened a drawer and showed deponent some money in bank notes, which they informed deponent that they were not making use of it, it being principally of western country banks, and which they had laid by, and which they expected would come in play. The money was under par, and the plaintiffs told deponent, that if deponent would make use of said money that he might have it, and pay them at some future day; and they stated to deponent, that if he did not use the money he might return it and be credited to its amount. That deponent took the money, but he does not recollect the exact amount. He thinks the amount was about * \$250. At the time of receiving said money deponent signed and gave to the plaintiffs the promissory note hereto **16** annexed for \$300, at ninety days, which deponent believes included an old balance previously due to them. That deponent carried the money to Mr. John Perkins, and asked him if he could manage to take up the note in bank, on which he and deponent were responsible, without discounting said money. Whereupon Perkins told deponent that he thought he could. Deponent went immediately to the eastern shore on other business, and on his return found that Perkins had procured it to be discounted at some exchange office. Deponent never ascertained how he discounted it. Deponent saith, that on the day of delivering the said letter or writing, the plaintiffs did not deliver to deponent any money. Deponent saith that he has no recollection of having made payment of any part of said money; but on seeing the sums endorsed on the promissory note hereto annexed, he presumes that he had paid those sums, and those only. Deponent saith that he obtained a final release under the insolvent laws of this State in Baltimore County Court, after the date of the above mentioned letter of Mr. Caton, and the said promissory note. Deponent saith he never asked plaintiffs to return Mr. Caton's said letter. Questions on the part of the defendant—1. Was there any conversation between you (deponent,) and the plaintiffs respecting Mr. Caton's letter referred to in the deposition, on the day of your receiving the money? Answer. Deponent does not recollect that there was anything said on that day about Mr. Caton; or his being security. 2. Did the plaintiffs lend you the money upon Mr. Caton's guarantee contained in his said letter? Answer. Deponent saith that he did not take it that they did. 3. Why do you draw this conclusion? Answer. Because of Mr. Shaw's declaration at the time of deponent's delivering him the letter as above stated by deponent. The plaintiffs also read in evidence the letter of the defendant attached to the said deposition marked (A):
Messrs. SHAW & TIFFANY, Balto. 29 July, 1817.

Sirs—Mr. Abijah Fenn tells me that he is about to loan from you five hundred dollars, and wishes me to state that I will become his

17 eventual security for the payment. This I am * willing so to do, as I believe Mr. Fenn will be very punctual, having found him so on similar occasions.

I am, respectfully, yrs.

RD. CATON.

Also the note thereto attached, and referred to in said deposition: For \$300.

Baltimore, *July 31st*, 1817.

Ninety days after date I promise to pay Shaw & Tiffany, or order, three hundred dollars, for value received.

ABIJAH FENN.

Witness: *C. N. Taylor*.

Endorsed, "Received Jany. 19, 1818, \$23.77, on ac. within. March, 25, 1818, Rec'd \$50.

SHAW & TIFFANY."

And also evidence that Abijah Fenn petitioned for the benefit of the insolvent laws of this State in August, 1820, and obtained his final discharge upon said petition in April, 1821. Also gave in evidence the following letter:

RICHD. CATON, Esq.

"Baltimore, *Feb. 27*, 1822.

Dear Sir.—Mr. Abijah Fenn having borrowed a sum of money from us on the strength of your written guaranty, which we hold, we are compelled to address you on the subject of payment by the failure of Mr. Fenn, who has lately taken the benefit of the insolvent law. The balance remaining due us is near \$250, and we wish the same paid or secured to us as soon as your leisure will permit. If payment is not convenient to you at present, we will allow a further time on receiving a bond with security.

Very respectfully, yr. ob. serv.

SHAW & TIFFANY,"

Which letter is admitted to be in the hand-writing of William C. Shaw, one of the plaintiffs, and to have been received by defendant on or about the day of its date. And also that the trustee of Fenn, under and by virtue of the said insolvent laws, had received no funds of Fenn, and had paid no dividend to his creditors. The plaintiffs also produced and offered in evidence by Charles N. Taylor, that he

18 was the clerk of the * plaintiffs at the time the loan was made by the plaintiffs to Abijah Fenn, and the letter of Caton to the plaintiffs, and the note of Fenn in their favor attached to the deposition of Fenn were respectively given. The witness on cross-examination also testified that the money loaned to Fenn was western country bank notes, meaning to include bank notes of Frederick County banks in this State. That the plaintiffs were not in the practice of receiving lots of country money which averaged a discount of more than five per cent. That some of the money may have been more than five per cent. discount, and some of less. That witness does not think that the money loaned to Fenn would average a discount of more than five per cent. but he thinks that it would average from two to five per cent. discount. That the plaintiffs were in the habit of occasionally passing off said country money at par, in the course of their business, and generally reserved it for the purpose of passing it at par, although generally they could not pass it

at par. Witness has no recollection of being present when the letter of Mr. Caton, which is attached to the deposition of Mr. Fenn, was presented to the plaintiffs. But witness states that he knows that Fenn had applied to the plaintiffs to borrow money before he brought Mr. Caton's said letter to the plaintiffs; that the plaintiffs refused to lend Fenn money without some security besides himself. Witness states that he repeatedly saw the said guaranty or letter of Mr. Caton in possession of plaintiffs; that they kept it in a small trunk of theirs among promissory notes due to them, and other papers. Witness also stated that he witnessed the note given by Fenn to the plaintiffs. Upon the foregoing evidence the defendant prayed the Court to direct and instruct the jury, that the plaintiffs were not entitled to recover, and that they must find a verdict for the defendant. Which direction and instruction the Court, [HANSON and WARD, A. J.] refused to give. The defendant excepted.

2. The defendant then prayed the Court to instruct the jury, that if they believed from the evidence that the money loaned to Abijah Fenn was country bank notes, which were at a greater discount than the legal interest on the sum loaned for ninety * days, that then the loan was usurious, and the contract, both between the plaintiffs and Abijah Fenn, and the plaintiffs and the defendant, is void. Which instruction the Court refused to give; but instructed the jury, that if they believe the testimony of Abijah Fenn, the contract therein referred to is not usurious. The defendant excepted. Verdict and judgment for the plaintiffs; and the defendant appealed to this Court. 19

The cause was argued before BUCHANAN, C. J., MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

Raymond and *Latrobe*, for the appellant, contended, 1. That there was no guaranty in this case, because the plaintiffs below, when the letter of the defendant was presented to them, refused to accept it as such. 2. That the transaction between the plaintiffs and Fenn was usurious, and therefore the guaranty was void.

1. There was no notice given to the defendant of the acceptance of the guaranty. *Laucrason vs. Mason*, 3 Cranch, 492; *Russell vs. Clark's Ex'rs*, 7 Cranch, 91; *M'Iver vs. Richardson*, 1 Maule & Selw. 557; 2 Stark. Evid. 648; *Symmons vs. Want*, 3 Serg. & Low. 389; *Craeger vs. Higginson*, 1 Mason, 323; *Russell vs. Perkins*, *Ib.* 368. 2. There was no evidence of a guaranty. If it is a guaranty it is to be strictly construed. 2 Stark. Evid. 614; *King vs. Baldwin*, 2 Johns. Ch. Rep. 554; *Ludlow vs. Simond*, 2 Caine's Cas. 1.

3. It was a usurious contract, and therefore void. *Doe vs. Barnard*, 1 Esp. Rep. 11; *Pratt vs. Willey*, *Ib.* 40; *Rich vs. Topping*, *Ib.* 176. 4. The direction of the Court to the jury was erroneous. It should have been left to the jury for them to say whether or not the

money loaned was at a discount, &c. *Massa vs. Dauling*, 2 *Stra.* 1243; *Tate vs. Wellings*, 3 *T. R.* 531; *Hammett vs. Yea*, 1 *Bos. & Pull.* 155; *Rich vs. Topping*, 1 *Esp.* 178.

20 * *Hinkley*, for the appellees. 1. The loan of the money is evidence of the acceptance of the guaranty. When the letter was delivered there was but one of the partners present. There was no absolute refusal by him. When both were present the next day, the money was loaned. The substantial point in question is, was the money loaned upon the guaranty? One partner cannot loan the funds of the partnership. *Fell on Guar.* 64, s. 25. Here the guaranty is retained by the plaintiffs; and it is natural to suppose they would loan upon the guaranty, than upon Fenn's responsibility only. There is no distinction between a general and special guaranty. As a general rule there is no necessity to give notice of the acceptance of a guaranty. It is only necessary, as in the case of *M'Iver vs. Richardson*, 1 *Maule & Selw.* 557, which was considered as a mere overture to guarantee; but not where it is a conclusive guaranty. *Fell on Guar.* 51. *Com. on Cont.* 207, (Ed. 1826.) A guaranty is to be construed most strongly against the guarantor. *Stadt vs. Lill*, 9 *East*, 348; *Rogers vs. Warner*, 8 *Johns. Rep.* 119; *Lawrason vs. Mason*, 3 *Cranch*, 492; *Grant vs. Redsdale*, 2 *H. & J.* 186; *Ferris vs. Walsh*, 5 *H. & J.* 306. If it is a sufficient guaranty, and the acceptance is averred in the declaration, and the goods, &c. are delivered, it is implied as done at the request of the guarantor, and no notice is necessary. If notice is necessary, it is to be presumed from the evidence. But notice was not necessary. *Warrington vs. Furber*, 8 *East*, 242; *Swinyard vs. Bowes*, 5 *Maule & Selw.* 62; *Fell on Guar.* 200, 217, 140; *Allen vs. Rightmere*, 20 *Johns. Rep.* 365.

2. The promissory note given by Fenn was payable at 90 days, without interest. This was perhaps to make up the difference in the value of the country bank notes which were loaned. The defendant prayed an absolute direction of the Court to the jury in the second bill of exceptions. This prayer the Court refused to give. What is the meaning of country bank notes? There were many banks incorporated by this State in the counties of Frederick, Washington and Allegany. These may be said to be country banks. The Legislature by the Act of 1818, ch. 191, declared that bank notes should not be passed for less than their nominal value. Bank notes have

21 * always been treated as money. *Chitty on Bills*, 425; (*Phill. Ed.*;) *Miller vs. Race*, 1 *Burr.* 457; *Fleming vs. Brook*, 1 *Sch. & Lef.* 318; *Knight vs. Criddle*, 9 *East*, 48; *Towson vs. Havre-de-Grace Bank*, 6 *H. & J.* 47; *Tate vs. Wellings*, 3 *T. R.* 531; *Maddock vs. Kumball*, 8 *East*, 304; 7 *Bac. Ab. tit. Usury*, (C.) 190; *Cutler vs. How*, 8 *Mass.* 257; *Tyson vs. Rickard*, 3 *H. & J.* 109; *Coombe vs. Miles*, 2 *Campb.* 553; *Pike vs. Ledwell*, 5 *Esp.* 164; *Chitty on Bills*, 538.

ARCHER, J. delivered the opinion of the Court. It is contended that the Court below should, upon the first bill of exceptions, have

directed the jury that the plaintiffs were not entitled to recover, because the guaranty was not accepted by the plaintiffs below; but that the sum advanced must have been loaned solely upon the responsibility of Fenn, in whose favor the guaranty was given. This must depend upon the fact whether there be any evidence from which the jury might have been justified in drawing the inference that the guaranty was accepted. If there be any, the Court below were right in refusing the direction, as it is the province of the jury to judge of the weight and sufficiency of evidence, and only for the Court to determine whether there be any evidence. Now there were circumstances from which the jury might have been justified in drawing the inference that the guaranty was accepted. The refusal of the plaintiffs to lend money without security; their willingness, previously expressed, to lend on Caton's security, (which facts are to be inferred from the evidence of Fenn;) their loaning within a short time after the receipt of the guaranty; their retaining it, and placing it away with promissory notes and evidences of debts due them. These were all facts proper to go to the jury, for the purpose of showing the loan of the money on the security and responsibility of Caton's letter. It is true that Shaw, when the letter was communicated to him, was understood to say, that he would have nothing * to do with Caton in moneyed transactions, or to have used expressions conveying some such idea. This seems to have 22 been the expression of the first impression upon the presentation of the letter, which not having been communicated, as appears by any evidence in the cause, to Caton, could not preclude him, or him and his partner Tiffany, from advancing the money two days after upon the strength of the guaranty. It was retained by them, and the money loaned on the second day afterwards; they were not bound to accept immediately, but they might have kept the letter for inquiry and consideration, notwithstanding the expression of Shaw on its first receipt. Although nothing was said, when the money was loaned, of the lending upon the security of Caton's letter; yet as the letter was retained, and the money actually advanced, it was properly a question, under all the circumstances, to be submitted to the consideration of the jury. But it is said that notice of acceptance, and notice of the extent of advances by the plaintiffs, should have been given to enable them to recover against the defendant; and this objection is grounded on the idea that this is a mere overture or offer to guarantee. If it is to be considered as a guaranty, there is an end of the objection. None of the authorities in such an event deemed such notice at all necessary. In the case of an offer to guarantee, it was determined in *M'Iver vs. Richardson*, 1 *Maule & Selwyn*, 563, that notice should be given, that it was regarded as a guaranty, and meant to be accepted, or that there should have been a subsequent assent, on the part of him who made the overture, to convert that, which was merely intended as an offer, into a conclusive guarantee.

This doctrine has been adopted in New York. This then being the law, we are brought to the question, whether the letter of Mr. Caton, which furnishes the foundation of this suit, is to be considered as an offer, or as a guaranty? We are at no loss here, as were the Court, in the case of *M'Iver vs. Richardson*, to ascertain the circumstances which gave rise to the letter, or under what representation he signed it. He was explicitly informed, that upon his security, the plaintiffs would lend the money; and declaring his willingness to go the security to enable Fenn to procure the loan, he addresses, under these circumstances, the letter which is the subject of controversy.

23 * He was then perfectly aware, that upon his letter the money would be obtained. He was apprised before he wrote it that it would be accepted, and he had declared his determination to become Fenn's security. With this information, and in this spirit, he prepares and delivers the letter. Its language appears to be very explicit. We will advert to it. "Mr. A. Fenn tells me that he is about to loan from you five hundred dollars, and wishes me to state that I will become his eventual security for the payment; this I am willing to do, as I have found him punctual on similar occasions." The substance of the letter is this: "I will become his eventual security for payment." Here is then no conditional engagement, but a conclusive undertaking. In *M'Iver vs. Richardson*, the Court considered the paper there offered as a proposition only leading to a guarantee. The words do not here import that if application were made to him he would guarantee; it required no intimation that it was regarded as a guaranty, for it spoke so intelligible a language that it could not be mistaken; and it is shown by the evidence that it conveyed to the plaintiffs the idea intended, which was, that he would be security for money loaned to the amount mentioned in the letter.

The second bill of exceptions is founded on the idea that the loan of bank notes, at a greater discount than the legal interest on the note for the time it had to run, was usurious. There cannot be a question but that the loan of bank notes passing at from 2 to 5 per cent. discount, and passing them in such loan, notwithstanding such discount, at their par or nominal value, unexplained by circumstances, would be usurious, and that it would render the contract between Fenn and the plaintiffs void; for the Courts will not permit the statute to be evaded by any devices, however subtle or artful, but will pursue the transaction through all its ramifications, for the purpose of discovering whether a loan of money at an exorbitant interest, and an evasion of the statute, has not been the real object and design of the parties; and they must be governed by such design or intention, when it shall have been collected from all the circumstances. No usurious intent can be here attributed to the plaintiffs. They take Fenn's note for the par value of the bank notes loaned, but

at the same time inform him, that if he * should not use them he was at liberty to return them, and he should be credited at their par value. From which the inference is clearly deducible, that they had no intention that they should be passed for less than their nominal amount; this fact, taken in connection with their habit, as proven, of taking such notes to be passed at par, evidence a clear manifestation of the non-existence of any usurious design. It was always in the borrower's power to exempt himself from a loss upon these notes by returning them to the plaintiffs, who had stipulated, whenever this was done, to credit him with their nominal amount. This he did not think proper to do, but through his agent passed them off at a discount; having done so, he could not rid himself from the payment by alleging usury in the transaction, unless indeed this privilege had been a mere cover to cloak the usurious design of the parties, for which there is not the slightest ground for inference or belief. We conceive, therefore, that no error exists in either direction of the Court.

24

Judgment affirmed.

BROWN vs. BRICE, Trustee of CAUSTEN.—June, 1827.

The provisional trustee of an insolvent debtor, appointed under the Act of 1816, ch. 221, is the mere recipient of the property of the insolvent, which the law contemplates his obtaining immediate possession of from the insolvent himself, and not by suit against a third person.

Such a trustee is not authorized to assign the insolvent's judgments; and where one purchased such a judgment from that trustee, and collected the same, he is answerable for the amount received by him, to the permanent trustee, in an action for money had and received.

APPEAL from Baltimore County Court. *Assumpsit* for money had and received. The case, as agreed upon, was this: James H. Causten issued an attachment out of Baltimore County Court against Monte Verde, for the recovery of a debt due to Causten before the 15th of April, 1818, and the attachment was laid in the hands of Peter A. Guestier. At March Term, 1821, of said Court, a verdict and judgment was obtained against the garnishee. An appeal was prayed by the garnishee, and the case carried to the Court of Appeals, where the judgment was affirmed, and an execution issued thereupon against * Guestier, the garnishee, who paid the amount to Stewart Brown, as hereinafter stated. On the 15th of April, 1818, Causten applied for the benefit of the insolvent laws of this State, and Frederick Jenkins was duly appointed his provisional trustee, and gave Causten the following authority to collect and settle claims due to him. "Mr. James H. Causten is authorized to settle any transaction in relation to his late business.

25

(Signed,)

FREDERICK JENKINS, *Trustee.*

Baltimore, 1 May, 1818."

And under this authority, and the authority of Causten, and at the instance of Guestier, Stewart Brown paid the judgment, deducting the legal interest, and took an assignment thereof from Causten, as well on his behalf, as on behalf and as the agent of the provisional trustee in virtue of the authority aforesaid. Brown knew at the time he did so, that Causten had petitioned, and that F. Jenkins was the provisional trustee. That the judgment was entered for Brown's use on the docket of the Court of Appeals, under the authority of Jenkins and Causten as above. The present plaintiff was duly appointed the permanent trustee of Causten, after the said assignment to Brown, and before Brown had collected the amount of said judgment from Guestier. The plaintiff gave notice to Guestier after the judgment was affirmed and execution issued, not to pay the amount to Brown, and was about to apply for an injunction, when it was agreed by the parties to this action that the money should be paid to Brown by the garnishee, Guestier, subject to any claim the present plaintiff might have as trustee. Causten obtained a final discharge as an insolvent debtor on the 26th of September, 1818. And it was also agreed that if the Court should be of opinion that Brown derived no right or title to the judgment so satisfied by and assigned to him, then a judgment to be entered for the plaintiff for the amount of the judgment in the Court of Appeals as affirmed, with interest and costs; otherwise for defendant.

A judgment *pro forma* was entered on the case stated, for the plaintiff, and the defendant appealed to this Court.

The cause was argued before BUCHANAN, C. J., ARCHER and DORSEY, JJ.

26 * *Williams*, (District Attorney of U. S.) for the appellant, referred to the Acts of 1805, ch. 110, s. 8, and 1816, ch. 221, s. 2, 3; *Kennedy vs. Boggs*, 5 H. & J. 403; 3 *Petersdorff*, 625; *Page vs. Bauer*, 4 Barn. & Ald. 345; 3 *Petersdorff*, 807 (notes,) 922; *Foster vs. Allanson*, 2 T. R. 479.

R. B. Magruder, for the appellee. On the first point, he cited *Martin vs. Mechanics' Bank of Baltimore*, 6 H. & J. 239, and the Act of 1715, ch. 40. On the second point, *King vs. Leith*, 2 T. R. 143; *Hindle vs. Bell*, 3 Serg. & Lowe, 61; *Kennedy vs. Boggs*, 5 H. & J. 408. On the third point, *Cumming vs. Roebuck*, 3 Serg. & Low. 64.

BUCHANAN, C. J. delivered the opinion of the Court. This case arises out of, and depends upon, the construction of the Act of 1816, ch. 221, relating to insolvent debtors in the City of Baltimore. The provision of that Act, so far as concerns the appointment and duties of provisional trustees, is, "that the commissioners shall appoint a provisional trustee, to take possession, for the benefit of the creditors, of such insolvent debtor, of all property, estate and effects, books, papers, accounts, bonds, notes, and evidences of debts," and

no other duty is by that Act assigned to the provisional trustee so to be appointed, who is not so much as required to give bond for the faithful discharge of the trust reposed in him.

In *Kennedy vs. Boggs*, 5 H. & J. 403, it was decided * by this Court, that such provisional trustee could not sustain a suit in his own name, for the purpose of reducing to possession the property of the insolvent, he being only authorized to take possession for the benefit of the creditors; but that in order to acquire possession suit could only be brought in the name of the insolvent, in whom the title remained until the appointment of a permanent trustee. 27

He is the mere recipient of the property of the insolvent, which the law would seem to contemplate his obtaining immediate possession of, from the insolvent himself, and not by suit against a third person; since it is upon the report of the commissioners "that he is in possession of all the property of the insolvent," that the personal discharge is granted, which report is required to be made by the commissioners, in the language of the Act, "immediately thereafter," that is immediately after the appointment of such provisional trustee, and the taking a bond for the appearance of the insolvent debtor to answer interrogatories, &c.

But for the authority, therefore, of *Kennedy vs. Boggs*, which is not intended to be disturbed, it might perhaps be plausibly questioned, whether a provisional trustee could sue at all even in the name of the insolvent, according to the spirit of the law, which contemplates a final discharge, and the appointment of a permanent trustee, in whom the property is to vest in a shorter time than would be required to bring a suit by the provisional trustee to a final issue. And his office being only to take possession of the property and evidences of debt of the insolvent, for the benefit of creditors, and that too without being required to give bond, it may well be doubted whether he has any authority in the name of the insolvent to sue for and collect his debts; to that extent the decision in *Kennedy vs. Boggs*, does not go.

The object of appointing a provisional trustee is that the property may be protected until the appointment of a permanent trustee, and the insolvent not permitted to waste or make way with it to the prejudice of the creditors. And hence he is required to take possession of the books, papers and accounts, and all evidences of debt; by which means the debts are placed beyond the reach or control of the insolvent, who not being in * possession of such evidences, can neither pass them away, nor sue for and recover the debts. 28 If that was not the intention of the Legislature, the providing for the appointment of a provisional trustee, and requiring him to take possession of all the evidences of debts, was perfectly nugatory. With respect to the provisional trustee himself, the express authority given to him is only to take possession of the evidences of debts, &c. He is not an officer in the confidence of

the creditors; they have no participation in his appointment, and repose no trust in him. And if he is permitted to sue for and collect the outstanding debts, in the name of the insolvent, the creditors are placed entirely at his mercy, and are in a situation of very little, if any more security, than if there was no such provisional trustee. For, though, he stands in the way of a waste and misapplication of the funds by the insolvent, yet there is certainly less danger of a total loss of those funds, when in the hands of many, in the shape of outstanding debts, than when drawn together into the hands of a single individual, who has given no security for the safe-keeping of those funds. And although the suspending the collection of the debts until the appointment of a permanent trustee, might in practice be accompanied by occasional inconvenience and loss, yet the law contemplates a final discharge, and appointment of such permanent trustee speedily after the application for the benefit of its provisions, and does not look to a delay pregnant with as much danger of loss as the collection of the debts by the provisional trustee. But if it be admitted that the provisional trustee has a right to sue for, and collect the debts, in the name of the insolvent, and so far as concerns this case, it may be admitted, yet it is very clear that he has no authority to pay or compound the debts of the insolvent, or to sell, or in any manner dispose of, his property, or assign away or transfer the evidences of debt; his duty is to take and retain the possession for the benefit of the creditors, until the appointment of a permanent trustee, in whom the title to all the property of the insolvent vests.

The case before us then is plainly this—James H. Causten, a citizen of Baltimore, having a claim against one Monte Verde, sued out an attachment, which was laid in the hands of Peter A. Guestier.

29 Causten afterwards, on the 15th of April, * 1818, applied for the benefit of the insolvent laws. Frederick Jenkins was appointed provisional trustee, who on the 1st of April, 1818, gave him authority to settle up his affairs, and on the 26th of September, 1818, he obtained a final release. The attachment was prosecuted against Guestier, the garnishee, to a verdict and judgment in Baltimore County Court at March Term, 1821, from which there was an appeal to this Court, where the judgment was affirmed. Pending the appeal, Causten, under the authority given him by Jenkins, the provisional trustee, to settle up his business, sold the original judgment against Guestier, to Stewart Brown, the appellant, who with a knowledge that Causten had applied for the benefit of the insolvent laws, and that Jenkins was appointed provisional trustee, paid for it the amount, deducting the legal interest, and took from Causten, acting as well in his own behalf as agent of Jenkins, an assignment of the judgment, which on the same authority was entered on the docket of this Court for the use of Brown. After this John Brice, the appellee, was duly appointed the permanent trustee; and

after judgment was affirmed, and an execution had issued, he gave notice to Guestier, the garnishee, not to pay the amount to Brown, when it was agreed between Brice and Brown, that the money should be paid to Brown, subject to any claim that Brice might have to it as trustee, which was accordingly done; and this suit for money had and received, was brought to recover from Brown the amount so received by him. And the question raised and submitted to us is, whether Brown has a right to it under his purchase, and the assignment by Causten of the original judgment to him; or whether the title to it is in Brice as trustee? Whether the attachment originally sued out by Causten was properly prosecuted in his name to final judgment, is not now a question; the judgment being rendered, and afterwards on appeal affirmed without objection, it is conclusive; and the only inquiry is, whether it was competent to Jenkins, the provisional trustee, or to Causten, either on his own account, or as agent of Jenkins, to give to that judgment any direction different from that provided by the insolvent laws. Causten himself having before obtained a final release, could in law have no control over it—his right to dispose of it was gone; and * Jenkins could 30 neither sell or dispose of it himself, nor authorize another to do so, any more than he could dispose of a bond, or any specific piece of property of the insolvent, coming into his possession as provisional trustee for safe-keeping only.

It stood as an evidence of debt for the benefit of the creditors, and the right did not pass to Brown by the unauthorized assignment; but on the appointment of Brice as permanent trustee, vested in him. If it were otherwise, it would always be in the power of an insolvent, and the provisional trustee, to place the whole of the property beyond the reach of the permanent trustee, who is alone entrusted with the settlement of the affairs of the insolvent, and to whom alone the interests of the creditors are confided beyond the mere preservation of the property until he is appointed, which, (and nothing more,) is given to the provisional trustee. Brown, therefore, acquired no right by the assignment of the judgment by Causten, to the money which is the subject of this suit; and under the agreement between the parties Brice is entitled to recover.

It was supposed, in argument, not to have been a "purchase" by Brown of the judgment, but a payment in discharge of it. We have considered it otherwise, and treated it as a purchase, the only light in which it can be viewed; and on that ground.

Judgment affirmed..

DUVALL vs. GRIFFITH.—June, 1827.

In an action on the case for slander, the plaintiff having proved the words as laid, may, for the purpose of showing the malice of the defendant, give in evidence the speaking of other slanderous words, of a similar import to those declared on, by the defendant of the plaintiff, before the bringing of the action. (a)

APPEAL from Montgomery County Court. This was an action on the case for slander, brought on the 9th of December, 1822. The plaintiff, (now appellee,) among other slanders declared for, charged the defendant with speaking of him the following words: "He, (meaning the plaintiff,) was a sheep-stealer, and that he stole old Plummer's sheep, and that he, (the defendant,) could prove that he, (the plaintiff,) did steal Joshua Plummer's and Philemon D. Ridgely's sheep, and William Etcheson's sheep," &c. Not guilty pleaded, and issue joined.

31 * The plaintiff at the trial proved the words as laid in the declaration; and also offered to prove that the defendant had said, prior to bringing the suit, that the plaintiff had stolen two of Philemon Ridgely's fat lambs, and that he and Kiah Owens had skinned them. The defendant objected to the evidence so offered of the charge of stealing two of P. Ridgely's lambs. But the Court, [KILGOUR and WILKINSON, A. J.] were of opinion that it was competent evidence for the plaintiff, and allowed the same to go to the jury. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and STEPHEN, JJ.

(a) Approved in *Garrett vs. Dickerson*, 19 Md. 450, where it is said, that in an action of slander, although the occasion upon which the words were spoken, may be such as to justify the legal influence that they were privileged, yet the jury may look to the words themselves, in connection with other facts than those from which the privilege is deduced, in passing upon the question of express malice, and evidence of other words and acts referring to the subject-matter of the actionable words, may be submitted to the jury for the same purpose, whether such other words or acts were spoken and done before or after the bringing of the suit. Cf. *Dorsey vs. Whipps*, 8 Gill, 465, (citing the case in the text,) and *Botelar vs. Bell*, 1 Md. 173. In an action of slander where the plaintiff, to prove malice and aggravate the damages, gives evidence of other and different words, spoken subsequent to those laid in the declaration, the defendant, to repel the presumption of malice and in mitigation of damages, may give evidence of the truth of such new matter under the plea of not guilty, although such new words be in themselves actionable. *Wagner vs. Holbrunner*, 7 Gill, 296.

Magruder, for the appellant, contended, that the evidence admitted by the Court below was not competent—other actionable words than those declared on being inadmissible. *Thomas vs. Croswell*, 7 Johns. 264; 2 Stark. Evid. 868, 870; *Stuart vs. Lovell*, 2 Stark. 93; *Wallis vs. Mease*, 3 Binney, 546; *Mead vs. Daubigny*, Peake's N. P. 125; *Lee vs. Huson*, *Ib.* 166.

B. S. Forrest, for the appellee, was stopped by the Court.

BUCHANAN, C. J. The Court are of opinion, that the testimony objected to by the defendant in the Court below, was admissible for the purpose of showing the malice of the defendant in speaking the words laid in the declaration; and if admissible for any purpose, the Court below were right in permitting the evidence to go to the jury.

Judgment affirmed.

EDELEN vs. THOMPSON.—June, 1827.

A verdict may be varied from at any time before it is recorded.

A sealed or privy verdict may be varied from in open Court. (a)

So, where the parties agreed that the jury might give their verdict to the clerk of the Court after the adjournment for the day, and the jury having signed and sealed a verdict delivered it to him, but on being called at the bar the next morning, before it was recorded, they were sent back * to their chamber by the Court to correct it, as it did not determine the issues joined in the cause to their full extent, and they found a new verdict which did. It was held, that the first verdict might be compared to one received by a single Judge out of Court, or to a sealed verdict retained by the foreman of the jury in his pocket, in neither of which cases is the verdict binding upon the jury, that a judgment entered on the second verdict was correct. 32

In an action of replevin, where the defendant pleaded *non cepit*, property in himself, and in strangers to the suit, on all which questions issues were made up, and the jury, as to part of the property, found for the plaintiff, and as to the residue for the defendant—Held, they were warranted in so finding; that however contradictory those issues seem to be, they are made from pleas not deemed incompatible; and while they are admitted to be pleaded together, every result from their use ought surely to have the countenance and support of the Court. (b)

APPEAL from Charles County Court. This was an action of replevin, brought by the appellant, (the plaintiff below,) against the appellee, (the defendant in that Court,) for a mare and colt, and certain negro slaves. The defendant pleaded, 1. *Non cepit*. 2. Property in Barton Hagan. 3. That the defendant had recovered judg-

(a) Cited in *Browne vs. Browne*, 22 Md. 114.

(b) Cited in *Lamotte vs. Wisner*, 51 Md. 561.

ment against Barton Hagan, upon which a writ of *fieri facias* issued, and was levied of his goods and chattels, viz. one mare and colt, and negroes Charity, Rachel, Samuel, Henry, and George. And that at the time of issuing the writ of replevin, the property in the said goods and chattels was in the sheriff, who had seized and taken the same under the said writ of *fieri facias*. 4. That the property in the said negroes at the time, &c. was in the then sheriff of Charles County, &c. 5. Property in the defendant. The plaintiff joined issue on the first plea, and pleaded general replications to the other pleas, on which issues were also joined.

At the trial it was "agreed that the jury give their verdict to the clerk after the adjournment of the Court." The Court adjourned. The jury returned, and filed with the clerk of the Court, on the 1st September, 1824, the following verdict: "We, the undersigned jurors, empanelled in the above case, do find for Eleanor Thompson, that she have a return of the negro slaves taken under and by virtue of the writ of replevin issued in this cause." Signed and sealed by the jurors. On the 2d of September, 1824, the Court met,

33 when it was ordered by the Court * that the jury retire to their chamber to correct their verdict—the same not being then recorded by the Court. The jury retired and returned, and by their verdict "find for the plaintiff as to the mare and colt mentioned in the writ of replevin, and do assess damages to fifty cents; and find for the defendant as to the residue of the goods and chattels mentioned in the writ of replevin." Judgment upon the verdict, that the plaintiff recover against the defendant, the mare and colt, &c. also the damages assessed, and costs. And also that the defendant recover against the plaintiff the residue of the goods and chattels, &c. and that she have a return thereof, &c. From this judgment the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE and MARTIN, JJ. by *Stonestreet*, for the appellant; and *R. Johnson*, for the appellee.

EARLE, J. delivered the opinion of the Court. It is alleged in this case, that the Court committed an error in sending back the jury to their chamber, who returned a different verdict from that rendered by them in the first instance. The Court were about to rise for the day, as the jury first retired from the bar, and for their convenience, the parties agreed that the jury give their verdict to the clerk, after the adjournment of the Court. After the rising of the Court, the jury gave to the clerk a verdict under their hands and seals, whereby they found for the defendant, the present appellee, that she have a return of the negro slaves, taken under and by virtue of the replevin issued in the cause. At the calling of the Court next morning, it was ordered by them, that the jury retire to

their chamber to correct their verdict, the same not being recorded by the Court. They retired under this order, and found the verdict on which this judgment is entered, for the plaintiff, (the appellant,) as to the mare and colt, mentioned in the writ of replevin; and for the defendant, as to the residue of the goods and chattels mentioned in the said writ of replevin.

What is the legal effect of this proceeding, is the doubt this Court has now to remove.

* It appears to us that the verdict handed to the clerk, is in the nature of a sealed or privy verdict, and might be varied from in open Court, and that no error was committed in ordering the jury to their chamber the next day to correct it. The rule is, that a verdict may be varied from by the jury, at any time before it is recorded; and the Court, who are best acquainted with their own practice, tell us, that the verdict under consideration had not been recorded by them. It was left with the clerk, for the ease of the jury, and may be compared to a verdict received by a single Judge out of Court, or to a sealed verdict retained by the foreman of the jury in his pocket, until the next meeting of the Court. In neither of which cases is the verdict binding upon the jury, but is liable to be changed and varied from by them in open Court. *Trials per Pais*, 309, 310. This is upon the principle that the verdict is not recorded; and it is not seen how it could be recorded in the instance before us, as the Court were not in session when the verdict was received by the clerk, nor does it appear that the parties, or either of them, were present, if in a legal sense it was possible for them to be present.

The other objection made by the appellant's counsel to the verdict, on the second plea found by the jury for the defendant, is not sustained. The jury found for her upon the two issues of *non cepit*, and property, and *non constat*, that they were not warranted in so finding. However contradictory those issues seem to be, they are made up from pleas that are not deemed incompatible; and while they are admitted to be pleaded together, every result from their use ought surely to have the countenance and support of the Court.

Judgment affirmed.

LOWRY *et ux.* vs. TIERNAN & WILLIAMSON.—JUNE, 1827.

D. and L. being infants and contemplating a marriage; the former (the intended wife,) being possessed of a large amount of United States stock, a few days before her marriage transferred the entire legal estate therein to trustees by deed, who were to permit her to receive during life the dividends and profits of the stock. She reserved no power over the principal, except the *jus disponendi* by last will and testament, to take * effect in case she died without leaving a child or descendant.

After their marriage and coming of age, on a bill filed by them

against the trustees praying to modify the trust, by having a part of the trust funds invested under the direction of the husband in the purchase of a farm—*Held*, that whether the deed was valid or fraudulent, the Court could not change the trust; that if valid, it had given the parties no control over the principal fund, and a Court of equity did not possess any power to change and modify trusts contrary to the manifest intention of the deeds creating them; or if a fraud on the rights of the intended husband, though the Court might set the deed aside, yet it could make no terms with a fraudulent instrument. (a)

APPEAL from a decree of the Court of Chancery, dismissing the bill of the complainants, in that Court, (the now appellants.) The bill stated, that Sally Ann Lowry, (late Sally Ann Dooris,) the wife of James Lowry, the other complainant, on the 18th of September, 1824, they then being single, and contemplating a marriage, and the said Sally Ann being possessed of, and entitled, to the sum of \$8,200, bearing interest at six per cent. per annum from the 1st of July, 1824, inclusively, payable quarter yearly, being stock created in pursuance of an Act of Congress, as per certificate, &c. That the said Sally Ann, being desirous of having the said stock and money placed at her own sole disposal, whether sole or married, she did on the said 18th of September, 1824, make and execute to Luke Tiernan and David Williamson, Junior, and the survivor of them, &c. a deed of assignment of the said stock, in trust, to pay over the interest on the said stock to the said Sally Ann, when and as the same should be received, at all times during the term of her natural life, whether she be sole or covert, so that neither the principal debt, nor the interest thereof, should at any time be liable to the disposition or control of any husband that she might have, nor be liable or bound for his debts, &c. And from and after her decease, in trust for all her children and descendants, if any she might have, that should survive her, to be equally divided, &c. But if she should depart this life without leaving a child or descendants, then in trust, as to the said debt or principal sum, for the use of such person or persons, as the said Sally Ann, by her last will and testament may name, to have and be entitled thereto; and in default of such nomination, then in trust for the right heirs of the said Sally Ann. And in either case to be transferred, at the decease * of the said Sally Ann

36 to the person or persons entitled, &c. as by the deed of assignment and certificate of stock in the possession of the said Tiernan and Williamson, will more fully appear. Prayer, that they may be

(a) Cited in *Cooke vs. Husbands*, 11 Md. 503, 507; *Tyson vs. Latrobe*, 42 Md. 837; *Nevin vs. Gillespie*, 56 Md. 327. Where a mode of alienation or of appointment is provided, it operates as a negation of any other mode. *Cooke vs. Husbands*, *supra*. The intent of the donor of the power is the great principle which governs in its construction, and that intent must be ascertained from the language used in the deed of settlement creating the estate. *Nevin vs. Gillespie*, *supra*.

produced, &c. The bill further states, that the said intended marriage between the complainants, was had and solemnized on the 21st of September, 1824; and that they were both infants when the said deed of assignment was executed, and when the said marriage was had and solemnized between them; but they are now of full age. That the said stock is about to be extinguished by the United States by the payment of the said sum of \$8,000. That the said Sally Ann is desirous of having a part of that sum invested, under the direction of her husband, in the purchase of a farm, &c. and that the uses and trusts expressed in the deed of assignment should be so altered or modified that Tiernan and Williamson, the said trustees, should hold the land, when purchased, and the balance of the said stock and money upon the following terms, viz. in trust, &c. That they have applied to Tiernan and Williamson to make the said purchase, and take a conveyance upon the uses and trusts before expressed, &c. But they replied, that being trustees they had no power of themselves to make any such purchase, or consent to a modification of the said trusts, &c. Prayer, that the said trustees be compelled to make the said purchase, &c. And for general relief. The answer of Tiernan and Williamson, the defendants, and now appellees, admit the several matters and facts set forth in the bill to be true. That they are mere trustees, without any interest, under the said deed of trust; and they did not feel themselves authorized to make or permit any application of the trust fund in their possession, and under their control, other than was authorized by the deed of trust. They exhibited the deed of trust, and also a copy of the certificate of stock, &c. The deed of assignment, as exhibited, is similar to that stated in the bill.

BLAND, C. (July, 1825.) In this case although it does not appear from any distinct expressions in the deed from Sally Ann Dooris to the defendants, that it was made in contemplation of a then intended marriage, yet from all the circumstances * of the case, it must be so considered as a contract by which an infant may be bound, because of its being ancillary to her contract of marriage. In this case Sally Ann must be bound by this deed, although made by her when under age, unless some of those circumstances of unfairness or disadvantage can be shown, which would induce a Court of equity to allow her to claim the privilege of her non-age. The instances where contracts of this kind have been vacated, are that the infant does not obtain, by the marriage settlement, an adequate consideration for her estate, which is tied up by it; or where the benefit conferred on her is vastly inferior to that which she would otherwise derive from her estate. But in this case it is difficult to see how her property could have been disposed of more to her benefit, during her coverture, than it is by this deed. If the Court were in any way to enlarge her discretionary power over this property, that

discretion would be exercised under the influence of her husband, and might cause a total loss. If the money secured by this deed, and directed to be placed in stock, were to be invested in land, and settled according to precisely the same uses, the land might be left unproductive to the wife. But there is a limitation over to the children of Sally Ann, who on her death will take as purchasers, and the Court can make no change in this settlement, which may in any manner impair or destroy their interests—Decreed, that the bill be dismissed, with costs to the defendants. From this decree the complainants appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, STEPHEN, ARCHER, and DORSEY, JJ.

Scott, for the appellants. The only question in this case is, whether a female infant, contemplating a marriage with a male infant, and making a voluntary settlement of her own estate, is bound by the settlement; or, whether it can be set aside after she becomes of age? He contended that such settlement was not binding upon her, and might be modified, or set aside, after she becomes of age; and cited 1 *Pow. on Cont.* 32, 54; *Com. on Cont.* 148; *Porter vs. Butler*, 3 *H. & McH.* 168; *Davis vs. Jacquin*, 5 *H. & J.* 100; *Moses vs.*

38 *Murgatroyd*, 1 *Johns. Ch.* 127; *Rogers & Wife * vs. Cruger*, 7 *Johns.* 557; *Rogers & Wife vs. Hurd*, 4 *Day*, 57; 1 *Fonbl.* 73, (note y;) *Harvey vs. Ashley*, 3 *Atk.* 613; *Opinion of Mr. Solicitor Dunning*, 1 *H. & McH.* 568; *Drury vs. Drury*, 5 *Bro. Parl. Cas.* 570; *S. C.* 2 *Eden*, 59, 60; *Durnford vs. Lane*, 1 *Bro. Ch.* 106; *Williams vs. Williams*, *Ib.* 152; *Countess of Strathmore vs. Bowes*, 1 *Ves. Jr.* 28; *S. C.* 2 *Bro. Ch.* 345; *Caruthers vs. Caruthers*, 4 *Bro. Ch.* 500, 506, (and note;) *Milner vs. Lord Harewood*, 18 *Ves.* 276.

Chambers, on the same side cited, *Bac. Abrid. tit. Jointure*, (B;) 1 *Marsh.* 312; *Carleton vs. Earl of Dorset*, *Eq. Ca. Ab.* 59, and 2 *Vern.* 17; *Harvey vs. Ashley*, 3 *Atk.* 611, 612, 614, and *Cannel vs. Buckle*, there cited; *Slocombe vs. Glubb*, 2 *Bro. Ch. Rep.* 550; *Jacques vs. Methodist Episcopal Church*, 17 *Johns.* 548.

No counsel appeared for the appellees.

ARCHER, J. delivered the opinion of the Court. There is in effect a negation in the deed of settlement of any general disposing power in Mrs. Lowry. The entire legal estate is transferred to trustees,

40 who are to permit her to receive, during life, * the dividends and profits of the stock. She has reserved no power whatever over the principal, except merely the *jus disponendi* by last will and testament, and that only in a certain event. She has completely parted with her power, dominion and control over her property, and has subjected it to specific purposes and trusts. 'With such a character impressed on the instrument, and viewing it as a good and valid deed, would a Court of equity possess any power to change

and modify those trusts contrary to the manifest intention of the deed of settlement? It would be of dangerous consequence to permit this to be done, and no authorities have been adduced by the appellants to show, that in such a case, such power of modification exists. Suppose rights, on certain contingencies, had been reserved by the deed to persons *in esse*, could this Court, upon a mere change in the will of the settler, unsettle, and absolutely disannul such contingent rights, unless a power had been reserved by the grantor?

Rights are reserved to such children as the grantor might have—they would take as purchasers—could this Court strip such children, if *in esse*, of their fixed and absolute rights? Or if unborn would not the principle be the same?

Mrs. Lowry is, besides, under the control of her husband, and the modifications proposed are for his benefit in part; for he becomes beneficially interested if the prayer of the bill be granted, on the happening of a certain contingency. Are we not, in the absence of all evidence to the contrary, under these circumstances, to found the presumption, growing out of the legal relations of the parties, that this change in the trust is sought to be attained by that influence and control which springs from their marital relations, and not from the free exercise of her own uncontrolled will and desire?

Courts of equity should ever look to the object and intention of the parties making such settlement, which being here to place the property beyond the control of the husband, they should not, by the exercise of a most questionable jurisdiction, defeat the intentions of the settler, explicitly declared, when she was free, and by so doing place, even on contingencies, her property under the dominion of her husband.

Had the deed of trust given her a control over the principal
 * of the funds conveyed, (admitting the validity of the deed,) **41**
 had she any power of appointment conferred by it, it cannot now be questioned but that she would have possessed the power to divert the estate thus settled, from those whose rights were by the instrument made contingent; but the deed in this case gives the *jus disponendi* to her only in a single event—efficacy is given to her will should she die without children.

The bill presents the pretensions of the complainants in singular and contradictory attitudes. It represents the deed, at one moment as valid, and grounds, on such validity, the proposed and alleged equitable modification.

In the next, it is treated as an absolute nullity, growing out of the grantor's minority. If valid, her deed is the law, which she has prescribed for the regulation of her property, and possessing no power herself to alter, modify, or change that law, she cannot accomplish through a Court of Chancery what she could not herself directly effect.

If it be void, why ask the Court to modify that which, at the election of the husband and wife, may be considered and treated as void? A Court of equity should not be called upon to do nugatory acts. If the deed be void, the parties could effect their object in the Courts of common law, or might avoid its stipulations by matter *in pais*.

But we would not wish to be considered as deciding the question, whether this deed be valid, or invalid; for whether it be the one or the other, we conceive we have no power to interfere.

Had the bill sought to invalidate the deed upon the ground that no redress could be had at law, the trust property being in government funds, and so beyond any legal process, the invalidity of the deed might then, perhaps, have become the subject of judicial inquiry in a Court of equity. But the funds consist of the loan of 1812, and we are bound judicially to know, that funds have been set apart by government for the reimbursement of the proprietors of this stock; and we must presume that the trustees have received it, as it was their duty so to do under the deed of trust.

It has been intimated that this deed was a fraud on the marital rights of the husband, and therefore should be modified as
42 * proposed. Were this so, a Court of equity, with the necessary allegations, none of which are made in this case, might set it aside, but it could make no terms with fraud. It could not set up an instrument thus contaminated.

In every view which we are enabled to take of the case, (and we have given it our attentive consideration,) we are led to the conclusion that the object of the complainants cannot be attained in a Court of equity.

Decree affirmed.

RABORG'S Adm'r *vs.* HAMMOND'S Adm'r.—June, 1827.

In an action of replevin for a slave, where the plaintiff derived his title under a will, a copy certified by the register of wills under his seal, is competent evidence.

The Orphans' Court of one county have no authority to grant letters of administration on the estate of a person who resided and died in another county. (a)

By the Act of 1798, ch. 101, sub-ch. 5, s. 8, the Orphans' Courts are expressly enjoined to inquire into and adjudicate on, the "time and place" of the death of a deceased intestate. That duty, however, is presumed to have been rightfully discharged, when the question of administration incidentally arises in other Courts; and therefore, in a suit instituted by the administrator, it is not competent for a Court of law to go into

(a) Approved in *Schultz vs. Houck*, 29 Md. 27.

an inquiry whether administration has been rightfully granted or not. (b)

If letters of administration have been improvidently issued, or have been obtained by fraud, or deceit, they may be revoked by the Orphans' Court upon application made for that purpose; the power of revocation under such circumstances, being necessarily inherent and a part, and of the essence of the power delegated to them, of granting administration. (c)

Where a witness stated that he was well acquainted with the family of two brothers, and was at their father's, and heard on the day of their burial, and at their funeral, from their father and sisters, that one of them, (naming him,) died a few hours before the other: and although at the time of the examination, one of the sisters was alive, and within the reach of the process of the Court, the father and the other sister being dead—*Held*, that such evidence of the times of the respective deaths of the said brothers, so far as the information of the witness was derived from the deceased father and sister, was admissible to prove which of the two brothers survived the other. (d)

A devise of negroes to T. his heirs and assigns, and "if the said T, should die without heirs of his body lawfully begotten, or before he shall arrive unto the full age of 21 years, then to A." &c. is good by way of executory devise to A. The word *or* in this limitation being construed to mean *and*. (e)

* APPEAL from Baltimore County Court. This was an action of replevin, brought on the 14th of September, 1816, 43 by the appellee, (the plaintiff in the Court below,) against the appellant, (the defendant in that Court,) for a slave named Nathaniel. The declaration stated the property of the slave in question to be in the plaintiff as administrator. The defendant pleaded prop-

(b) Affirmed in *Wilson vs. Ireland*, 4 Md. 448; *Edelen vs. Edelen*, 6 Md. 295; *Lee vs. Price*, 12 Md. 256. In *Wilson vs. Ireland*, the decision in the case in the text is said to be fortified by impregnable reasoning.

The case in the text is approved as to the conclusive character of the judgment of a Court of competent jurisdiction coming incidentally in question in another Court in the following cases: *Lloyd vs. Burgess*, 4 Gill, 198; *Powles vs. Dilley*, 9 Gill, 241; *Ranoul vs. Griffie*, 3 Md. 60; *Cook vs. Carroll*, 6 Md. 112; *Clark vs. Bryan*, 16 Md. 176; *Tabler vs. Castle*, 22 Md. 102; *Groome vs. Lewis*, 23 Md. 151; *State vs. Ramsburg*, 43 Md. 335; *Donohue vs. Daniel*, 53 Md. 601. See also *Barney vs. Patterson*, 6 H. & J. 156, note (c); *Fishwick vs. Sewell*, 4 H. & J. 311.

Further illustrations of the maxim, *omnia rite esse acta praesumuntur*, may be found in *Taylor vs. Phelps*, 1 H. & G. m. p. 492; *Fridge vs. State*, 3 G. & J. 114; *Hanson vs. Barnes*, 3 G. & J. 368; *Hannon vs. State*, 2 Gill. 49; *Crouch vs. State*, 1 Md. Ch. 404; *Horner vs. O'Laughlin*, 29 Md. 471; *State vs. Layman*, 46 Md. 192; *Abell vs. Simon*, 49 Md. 323.

(c) Approved, as to the exercise of constructive powers by the Orphans' Courts, in *Montgomery vs. Williamson*, 37 Md. 429; *In re Estate of Stratton*, 46 Md. 553; *Munnikhuyzen vs. Magraw*, 57 Md. 185.

(d) Cf. *Sprigg vs. Moule*, 28 Md. 497,

(e) Affirmed in *Watkins vs. Sears*, 3 Gill, 496; *Neal vs. Cosden*, 34 Md. 427; *Carpenter vs. Boulden*, 48 Md. 129.

property in herself as administratrix. To this plea there was a general replication, and issue was joined.

1. The plaintiff at the trial offered to read in evidence the following paper, purporting to be a copy of the will of a certain Thomas Hammond, under whom the plaintiff claims the property in dispute in this cause: "In the name of God, Amen. I, Thomas Hammond, of Anne Arundel County, and Province of Maryland, being of perfect sound mind and memory, and ordered in a few days to join General Washington's army, and if it should be the pleasure of our Supreme Judge that I should not return again, I hereby make my last will and testament in manner and form following, to wit: I give," &c. &c. "Item. I give and bequeath unto my said son, Thomas Hughes Hammond, his heirs and assigns forever, negroes Mariah and Nell, also three of my best horses, and four of my best cows, with all the increase of the said negroes and stock, but the said negroes and stock are to remain and in possession of his mother until he shall arrive to the full age of twenty-one years, and if his mother should depart this life before he shall arrive to the full age of twenty-one years, then my executors are to take the said negroes and stock under their care. And if the said Thomas Hughes Hammond should die without heir of his body lawfully begotten, or before he shall arrive unto the full age of twenty-one years, then I give and bequeath unto my brother Andrew Hammond, his heirs and assigns, forever, all my dwelling plantation, with the appurtenances thereto belonging; also the negroes and stock devised above to the said Thomas Hughes Hammond, but the negroes to remain and be in possession of his mother, Elizabeth Hammond, during her natural life. It is also my desire that the lot of ground," &c. &c. "I hereby appoint my brothers William Hammond and Andrew Hammond to be executors of this my last will * and testament. In testimony whereof I have hereunto
44 affixed my hand and seal this twenty-sixth day of August, 1776. THOMAS HAMMOND. [Seal.]

Signed, sealed and delivered, in the presence of us, George Hammond, Junr., Harriet Hammond, Margaret Hammond.

Anne Arundel County, *scd.* The 24th March, 1777, came George Hammond, one of the subscribing witnesses to the within will, and made oath on the Holy Evangelists of Almighty God, that he saw Thomas Hammond, the testator, sign and seal this will, and heard him publish, pronounce and declare the same to be his last will and testament, and at the time of his so doing he was of a sound and disposing mind, memory and understanding; and that he, together with Harriet Hammond and Margaret Hammond, signed their names as witnesses to this will, in the presence and at the request of the testator, and in the presence of each other.

Sworn before me,

ELI VALETTE, D. Com. A. A. Co.

In testimony that the foregoing is a true copy taken from Liber W. S. No. 2, folios 432 to 433, I hereto set my hand, [SEAL.] and affix the seal of my office, this 21st day of May, 1825.
THOS. H. HALL, Reg. Wills, A. A. Coty."

To the reading of which paper in evidence the defendant objected; but the Court, [ARCHER, C. J. and WARD, A. J.] overruled the objection, and suffered the paper to be read to the jury, being of opinion that the same was competent evidence in this cause. The defendant excepted.

2. The plaintiff then proved by a competent witness, that Thomas Hammond, the above named testator, died in January, 1777, and Andrew Hammond, who is named in the aforementioned will, survived the testator, and resided and died in Anne Arundel County in this State, a few hours after the testator. And then, to show himself to be the administrator of said Andrew, duly appointed, offered to read, and did read in evidence, the following certificate of the granting of administration on the estate of said intestate, Andrew Hammond, to him the plaintiff, given by the register of wills for Baltimore County in this State.

* "United States of America. The State of Maryland, to all whom these presents shall come. Know ye, that on the eleventh day of June, in the year of our Lord one thousand eight hundred and sixteen, administration of all and singular the goods, chattels and credits, which were of Andrew Hammond, late of said county, deceased, was granted and committed unto Samuel J. Donaldson of the county aforesaid, he having first entered into bond, with sufficient security, for the due performance thereof; and also taken an oath well and truly to administer the same, to exhibit a true and perfect inventory of the said goods and chattels, and to render a just account of his administration when he should be there-to legally required. 45

Given under my hand, and seal of office, this twenty-fourth day of October, in the year of our Lord eighteen hundred [SEAL.] and twenty-five, and of the Independence of the United States the fiftieth.

D. M. PERINE,

Register of Wills for Baltimore County."

Upon which the defendant prayed the opinion of the Court, that the letters of administration, so granted to the plaintiff, were wholly inadmissible and void, and that the Orphans' Court of Baltimore County had no authority to grant the same. Which opinion the Court refused to give. The defendant excepted.

3. The plaintiff then gave in evidence, by a competent witness, that Thomas Hammond, the testator before mentioned, and Andrew Hammond, the plaintiff's intestate, died and were buried on the same day, at their father, Lawrence Hammond's farm; and he further offered to prove by the same witness, that he was well acquainted with the family of the said Thomas and Andrew Hammond, and

was at their father's, and heard, on the day of the burial of the said Thomas and Andrew, and at their funeral, that the said Thomas died a few hours before the said Andrew; and that he heard that fact from the father (who is now dead,) of said Thomas and Andrew, and from the sisters of said Thomas and Andrew, one of whom, (that is one of the sisters,) is now dead, and the other, Harriet Hammond, is now living in the City of Baltimore. To the admissibility

46 of which said hearsay evidence of the death of said * Andrew after Thomas, the defendant objected. But the Court were of opinion that the evidence of the time of the respective deaths of Thomas Hammond and Andrew Hammond, so far as the information of the witness was derived from the father and sister who are now dead, is admissible evidence to prove that the said Andrew Hammond survived the said Thomas. The defendant excepted.

4. The plaintiff in addition, &c. offered in evidence, that Thomas Hammond, late of Anne Arundel County, deceased, was in his life-time possessed of two negro women named Nell and Maria, as his own property; and on the 26th of August, 1776, duly executed his last will and testament, as herein before mentioned; that after the execution of said will and testament the said Thomas Hammond, the testator, departed this life, possessed of the said negroes as his own property, leaving his said son Thomas Hughes Hammond then an infant, and his widow the said Elizabeth, the mother of the said Thomas Hughes Hammond, and the said Elizabeth took possession of said negroes Nell and Maria; that after the death of said testator the said negro Nell had a son named Nathaniel, or Nat; and that said Thomas Hughes Hammond afterwards departed this life before he attained the age of twenty-one years, unmarried, and without issue. That the said Elizabeth Hammond, after the death of her said son, retained the possession of said negroes Maria and Nell, and their increase, and sold Nat above named, to a certain Samuel R. Smith, for a valuable consideration, and delivered to him the possession of said Nat; and the said Samuel R. Smith afterwards sold and delivered said negro Nat to the defendant's intestate for a like consideration; and that said Elizabeth afterwards died before the present action was instituted. The plaintiff also offered in evidence, that Andrew Hammond, named in the will of the said Thomas Hammond, survived the said Thomas, the testator, and afterwards died in the life-time of said Thomas Hughes Hammond, intestate. And also offered and read in evidence the certificate of the granting of the letters of administration on the personal estate of said Andrew Hammond, to the plaintiff. And also offered in evidence, that

47 negro Nathaniel or Nat, * above named, to recover whom the present replevin was brought, is the same negro Nathaniel or Nat, who was the son of negro Nell above named. Whereupon the defendant prayed the opinion of the Court, and their direction to jury, that upon the evidence above stated the plaintiff is not entitled

to recover. Which opinion and direction the Court refused to give. The defendant excepted; and the verdict and judgment being against her, she appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, STEPHEN, and DORSEY, JJ.

Meredith and *R. Johnson*, for the appellant, contended, 1. On the first bill of exceptions, that the paper offered in evidence was improperly admitted, because it was not properly authenticated. 2. On the second bill of exceptions, that as Andrew Hammond, the plaintiff's intestate, appears by the evidence to have resided and died in Anne Arundel County, the Orphans' Court of Baltimore County had no authority to issue letters of administration on his estate; and that the letters which they did issue were wholly void. 3. On the third bill of exceptions, that the hearsay evidence of the times of the deaths of Thomas and Andrew Hammond, admitted by the Court below, was improperly received. 4. On the fourth bill of exceptions, that the Court below should have granted the defendant's prayer, that the plaintiff was not entitled to recover; because by the will of Thomas Hammond, the absolute property in the woman Nell, and her increase, part of which issue was in controversy in this cause, was vested in Thomas Hughes Hammond, the legatee mentioned in the will; and the bequest over to Andrew Hammond, the plaintiff's intestate, was void, because too remote.

1. The objection raised as to the evidence admitted in the first bill of exceptions was abandoned.

2. On the second point, they cited the Act of 1798, ch. 101, sub-ch. 5, s. 2, and sub-ch. 15, s. 20; *Scott vs. Burch*, 6 H. & J. 67; *Cullum vs. Bevans*, *Ib.* 469; 2 *Stark. Evid.* 546; *Wilbraham vs. Snow*, 2 *Saund.* 47 k; *State vs. Spedden*, 3 H. & J. 251.

*3. The hearsay evidence offered was inadmissible, because there was a person living who was a witness to the same fact. 48 It was not, therefore, the best evidence in the reach of the party. 1 *Phill. Evid.* 174, 167, 175; *Williams vs. East India Company*, 3 *East*, 193.

4. The bequest over was too remote, and was therefore void. Even if or is to be construed and, yet the limitation over is void. *Whitmore vs. Weld*, 1 *Vern.* 326. 347; *Gray vs. Shawn*, 1 *Eden*, 153. But neither of the constructions is the correct one. The Court may reject the words "or before he shall arrive unto the full age of twenty-one years." *Attorney-General vs. Hird*, 1 *Bro. Ch.* 170. If the preceding words are retained, do they import a general failure of issue of the legatee? 2 *Fearne*, (7th Ed.) 136, 339, 486; *Goodman vs. Goodright*, 2 *Burr.* 873; 2 *Blk. Com.* 175; *Dallam vs. Dallam*, 7 H. & J. 220. The words heir of the body, and heirs generally, and like issue, are synonymous. *Butterfield vs. Butterfield*, 1 *Ves.* 133; *Attorney-General vs. Hird*, 1 *Bro. Ch.* 170; *Crooke vs. De Vandes*, 9

Ves. 197; *Elton vs. Eason*, 19 *Ves.* 73; *Hill vs. Burrow*, 3 *Call.* 342; *Tate vs. Tally*, *Ib.* 354; *The opinion of Daniel Dulany, Esquire*, 1 *H. & McH.* 559; *Britton vs. Twining*, 3 *Meriv.* 176, 183; *Fearne*, 178; *Co. Litt* 22 a; 6 *Cruise*, 332, s. 13, 14, 15; *Denn vs. Slater*, 5 *T. R.* 335; *Preston on Leg.* 98; *Donn vs. Penny*, 1 *Meriv.* 20; *Purefoy vs. Rogers*, 3 *Saund.* 388, (note 9;) *Seale vs. Seale*, 1 *P. Wms.* 290; *Stratton vs. Payne*, 3 *Bro. P. C.* 257; *Preston*, 148; *Barlow vs. Salter*, 17 *Ves.* 481; *Hunt vs. Stevens*, 3 *Taunt.* 115; 2 *Phill. Evid.* 290.

Taney and *S. J. Donaldson*, for the appellee. 1. On the second bill of exceptions, they referred to the Act of 1798, ch. 101, sub-ch. 5, s. 2, 3, and the Act of February, 1777, ch. 8, which was not repealed by that of 1798, except so far as was inconsistent with it. *Kempe vs. Kennedy*, 5 *Cranch*, 186; *Shivers vs. Wilson*, 5 *H. & J.* 130; *Barney vs. Patterson*, 6 *H. & J.* 182; *Burch vs. Scott*, *Ibid.* 67; 3 *Bac. Ab.* 50, 51; *Hepburn vs. Sewell*, 4 *H. & J.* 393.

* 2. On the third bill of exceptions, 1 *Phill. Evid.* 187; *Jack-
49 son vs. Boneham*, 15 *Johns.* 226; *Highham vs. Ridgway*, 10 *East*, 120; *Whitelocke vs. Baker*, 13 *Ves.* 514.

3. On the fourth bill of exceptions, they were stopped by the Court.

DORSEY, J. delivered the opinion of the Court. The opinion of the County Court, on the first bill of exceptions, being concurred in by consent, we approach the consideration of the question arising on the second bill of exceptions, not without a just sense of its intrinsic difficulty, and the important consequences which may result from its determination, let that determination be what it may.

It cannot be denied, that if Andrew Hammond resided and died, as is alleged, in Anne Arundel County, that the Orphans' Court of Baltimore County had no authority to grant on his estate letters of administration to the appellant.

But the question is, such letters having been granted, is it competent for a Court of law, in which a suit may be instituted by the administrator, to go into an inquiry whether administration has been rightfully granted or not?

If such inquiry can be made in this incidental collateral mode of proceeding, you convert the County Courts into appellate tribunals to revise and reverse the decrees of the Orphans' Court, on subjects over which, by law, they have the sole and exclusive jurisdiction, and in relation to which their acts can only be reviewed by regular appeal to the Court of Chancery or Court of Appeals; and this inquiry, too, if tolerated, would generally work injustice, and operate as a surprise upon the party. Without any direct or positive motion that the legality of his appointment were at all put in issue, he might be turned out of Court by the admission of testimony which he did not anticipate, and of which he could have offered the most conclusive refutation, had an opportunity been afforded him. Rest-

ing, too, upon verdicts of juries, the question of administration would ever be involved in perilous uncertainty; a verdict delivered in one case would be no evidence on a trial in another; conflicting verdicts might be given by different juries in the same term, and in the same Court; and much more probable is it, that such *incongruity would arise where trials are had in different Courts, 50 or at different terms. Indeed it might not unfrequently happen, in such a state of interminable controversy, that an administrator, after recovery of one-half the property and debts belonging to the deceased, by the death of witnesses, or some such cause, might be forever deprived of all chance of recovering the residue; the proof to sustain his right to the administration being no longer attainable; a result ruinous as well to creditors as to helpless widows and orphans, who have ever been the especial objects of favor and protection of the law. Every consideration, therefore, of convenience, justice and public policy, demands that the question of administration, when finally determined by the tribunals created for that purpose, should never be a subject of doubt or litigation when incidentally arising in other Courts. Such an anomaly in judicial proceedings, this Court would never willingly sanction.

By the Act of 1798—ch. 101, sub-ch. 5, s. 3, the Orphans' Courts are expressly enjoined to inquire into and adjudicate on the "time and place" of the death of the deceased intestate; and this duty we are bound to presume has been rightly discharged; but whether it be so or not, is in this case no longer a subject open to discussion. If there be any principle of law in this State unalterably settled by authority it is this, that the judgment of a Court of competent jurisdiction, when coming incidentally in question, or offered as evidence of title in any other Court (as is the case here,) is conclusive upon the question decided, and cannot be impeached on the ground of informality in the proceedings, or error or mistake of the Court, in the matter on which they have adjudicated. *Barney's Lessee vs. Patterson*, 6 H. & J. 182, and the case of *Taylor & M'Neal vs. Phelps*, 1 H. & G. 492.

It has been strongly urged in the argument of the appellant's counsel, that if the judgment of the County Court be sustained, the grossest frauds and deceptions will be practised in obtaining letters of administration in other counties than those in which intestates may have died; and that there may be at the same time two or more administrators appointed by the Orphans' Courts of different counties.

* Let the decision of this Court on the subject before them be what it may, it neither increases nor lessens the inconveniences which have been suggested. 51

For this evil the Orphans' Court alone are competent to apply a remedy. If letters of administration have been improvidently issued,

or have been obtained by fraud or deceit, they may be revoked by them upon application made for that purpose.

But it is alleged that this power of revocation is denied to the Orphans' Courts by the 20th section of the 15th sub-chapter of the Act of 1798, ch. 101, which provides that "the Orphans' Court shall not under pretext of incidental power or constructive authority exercise any jurisdiction whatever not expressly given by that Act or some other law." But to this it may be answered that we deem the power of revocation, under such circumstances, as necessarily inherent in the Orphans' Courts, and a part and of the essence of the power delegated to them, of granting administration. In confirmation of which, see 3 *Bac. Ab.* 50, where speaking of the ecclesiastical tribunal of England in the reference to this power, it is stated, that "it would be absurd to allow a Court jurisdiction herein, and at the same time deprive them of the liberty of vacating and setting aside an act of their own, which was obtained from them by deceit and imposition." But this question, even if it were matter of doubt, we should be disposed to view as settled by the construction given to this Act of Assembly by the Orphans' Courts, who have exercised this power from the time of its passage until the present day, a space of nearly thirty years; and by the decision of this Court in the case of *Fishwick vs. Sewell*, 4 *H. & J.* 429, where in affirming the opinion of the County Court in rejecting testimony offered to impeach letters of administration, they say, "that the said letters of administration were legally efficient until revoked, being clothed with all the requisite solemnities to communicate power and authority to the plaintiff to administer;" thus distinctly recognizing the authority of the Orphans' Courts to revoke letters of administration improperly granted.

It is, however, further urged as a reason why the inquiry attempted in the County Court should be permitted, that * admitting
52 the existence of the power of revocation in the Orphans' Courts; yet it may occur that where there are two administrations, upon mutual applications to revoke, both Courts may overrule such applications, and thus a double administration would be legalized. To this suggestion the reply is, that such an event, though possible, is of improbable occurrence; that should it ever happen by mutual appeals to this Court, the corrective would be speedily applied.

In the opinion of the County Court then, in the second bill of exceptions, we see nothing to complain; nor is there discernible in the third bill of exceptions any greater cause of complaint. To show that Andrew Hammond survived the testator, Thomas Hammond, and thus became capable of taking the property devised to him, on the happening of the contingency mentioned in Thomas Hammond's will, the plaintiff offered to prove by a competent witness, that he was well acquainted with the family of Thomas and Andrew Hammond, and was at their father's and heard, on the day of the burial of the

said Thomas and Andrew, and at their funeral, that the said Thomas died a few hours before the said Andrew, and that he heard that fact from the father, (who is now dead,) of said Thomas and Andrew, and from the sisters of the said Thomas and Andrew, (one of whom is now dead,) and the other, Harriet Hammond, is now living in the City of Baltimore. To the admissibility of which hearsay evidence of the death of said Andrew and Thomas, the defendant, by her counsel, objected; "but the Court were of opinion, that the evidence of the times of the respective deaths of Thomas Hammond and Andrew Hammond, so far as the information of the witness was derived from the father and sister, who are now dead, is admissible evidence to prove that the said Andrew Hammond survived the said Thomas;" and with this opinion we entirely concur. It is objected that the witness having stated that he received the same information from Harriet Hammond (a witness within the reach of the process of the Court,) that he did from her father and sister, he has thereby shown that there is better evidence attainable than that which was offered; that Harriet Hammond, whose testimony the plaintiff might have obtained, was present at the death of her brothers, and if produced could prove who died first. * But neither of those positions are sustainable. It does not appear by the testimony offered, that either the father, Harriet Hammond, or her deceased sister, were eye-witnesses of the death of Thomas and Andrew Hammond, or either of them. For aught that is disclosed by the witness, the father and deceased sister may have been present at the deaths, but not Harriet Hammond, her information may have been derived from them, or from some other less authentic source; and this may be the reason why her attendance was not required by the plaintiff. This Court, however, wish to be understood as not even giving an intimation that there would be any error in the opinion of the County Court, if the testimony offered had shown that the father and both sisters were present at the deaths of Thomas and Andrew Hammond. 53

In the fourth bill of exceptions, the Court having refused the general prayer of the defendant, that the plaintiff was not entitled to recover, the appellant seeks to reverse this opinion on the ground that the limitation over (in the will of Thomas Hammond,) to Andrew Hammond, in case "Thomas Hughes Hammond should die without heir of his body lawfully begotten, or before he shall arrive unto the full age of twenty-one years," operated by way of contingent remainder, and not by way of executory devise. That the words "heir of his body lawfully begotten," were synonymous with the word "issue," was rightly admitted by the counsel on both sides. That the word "or," in the limitation over, must be construed to mean "and," in the place in which it was used; and in all similar limitations, where the effect of construing it disjunctively would be to disinherit the issue of the first devisee, should he die under the

age of twenty-one years, has been so repeatedly settled by the most solemn adjudications, that it has become the duty of Courts of justice no longer to listen to an argument on the subject, much less to refer to authorities in support of such a position. The words "heir of his body lawfully begotten," in the devise in question, being assumed to mean "issue," and the word "or" to mean "and," that the limitation over to Andrew Hammond operates as a good executory devise, (Thomas Hughes Hammond having died under age and without issue,) is so immutably fixed by the recent solemn
54 * decisions of this tribunal in the case of *Dallam vs. Dallam*, 7 H. & J. 220, and *Newton vs. Griffith*, 1 H. & G. 111, that this Court did not feel themselves at liberty to permit the point to be discussed before them. 'Tis true *Dallam vs. Dallam*, and *Newton vs. Griffith*, were cases of devises of real estate only, but Courts of justice will go much further in supporting executory devises of personal than of real property.

Concurring in opinion with the Court below on the several bills of exceptions taken in this cause, we affirm their judgment.

Judgment affirmed.

CARROLL, Ex'r of BISCOE vs. TYLER.—June, 1827.

The register of wills of a county where letters testamentary were granted, acting as the agent of an executor or administrator in the settlement of an estate, is on a footing with every other individual in the community, and entitled to compensation for his services as agent, though for those rendered in his official character, he can charge nothing but what the fee bills allow him.

The agent of an executor in the settlement of the testator's estate, to show himself entitled to compensation for his services, may offer in evidence the receipts of the representatives for their portions of the estate taken, acknowledged, and recorded according to law. (a)

Copies of such receipts, duly attested under the seal of the recording office, are also evidence for the same purpose. (b)

Where representatives of a deceased party made acknowledgments of receipts to an executor, for their portions of a testator's estate, before a Justice of the Peace, or register of wills of any county, in the absence of proof of actual residence elsewhere, they will be presumed to reside in the county where the acknowledgments were taken. (c)

APPEAL from Prince George's County Court. Action of assumption for work and labor, &c. The defendant, (now appellant,) pleaded the general issue.

(a) Cited in *Fennerstein's Champagne*, 3 Wallace, 148.

(b) Cited in *Mitchell vs. Mitchell*, 1 Gill, 81.

(c) Approved in *Warner vs. Hardy*, 6 Md. 537, and *Fouke vs. Fleming*, 13 Md. 411. As to the acknowledgment of releases and receipts to executors, &c. see Rev. Code, Art. 50, secs. 181, 182.

1. The plaintiff, (the appellee,) gave evidence at the trial, that the defendant's testatrix was the administratrix of George Biscoe, late of Prince George's County, deceased, and that he acted as her agent in the settlement of the estate of the said George Biscoe; and then offered to read in evidence certain documents, which after giving lists of the property of the deceased, are as follows: "Received on the 12th day of June, * 1818, of Mrs. Araminta Biscoe, administratrix of George Biscoe, deceased, the above list of property, amounting to the sum of three thousand six hundred and twenty-five dollars and ninety-one cents, on account of my dividend of the personal estate of the said George Biscoe, deceased; and if I have received more than my legal dividend thereof, I hereby oblige myself, my executors and administrators, to refund the same.

55

GEORGE W. BISCOE.

Taken and acknowledged before me, the day and year first within mentioned.

TRUEMAN TYLER,

Reg. of Wills for P. G. Cty."

State of Maryland, Prince George's County, *scd.* In testimony that the within and foregoing is truly copied from the original filed and recorded in my office, I hereto set my hand, [SEAL.] and affix the public seal of my office, this 13th day of July, A. D. 1825.

TRUEMAN TYLER,

Reg. of Wills for P. G. Cty."

Also a similar receipt signed by Charles Steuart, and acknowledged and certified in like manner. To the admissibility of which evidence the defendant objected; but the Court, [STEPHEN, C. J. and KEY, A. J.] were of the opinion that the said testimony was admissible, and permitted the same to be read to the jury. The defendant excepted.

2. The defendant then gave evidence, that during the time when the said services were rendered, the plaintiff was register of wills in and for Prince George's County, duly commissioned and qualified; and then prayed the Court to instruct the jury, that if the jury should be of opinion from the evidence, that the plaintiff was the register of wills in and for Prince George's County, duly commissioned and qualified, at the time when the said services were rendered by the plaintiff to the defendant's testatrix, that then they must find a verdict for the defendant. Which direction the Court refused to give; but were of opinion, and so directed the jury, that the plaintiff was not entitled to recover compensation for any services which he had rendered in his capacity of register of wills, or for which he had a right to charge as such, or which in any manner appertained to the duties of his office as register; but that he was * entitled to recover for any services which he rendered in his private or individual capacity. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

56

The cause was argued before BUCHANAN, C. J., EARLE, and MARTIN, JJ.

C. Dorsey, for the appellant, contended, 1. That the receipts offered in evidence were inadmissible, it not being stated therein that the persons giving and acknowledging the receipts, resided in the county where the acknowledgments were made. 2. That the action could not be sustained, the consideration being contrary to the policy of the law. On the first point, he referred to the Act of 1809, ch. 168. On the second point, he referred to the Acts of 1801, ch. 74, s. 7; 1802, ch. 101, s. 4; 1816, ch. 203; and November, 1779, ch. 25, s. 7.

Stonestreet and *J. Johnson*, for the appellee. On the first point, they cited *Bryden vs. Taylor*, 2 H. & J. 396. The Act of 1798, ch. 101, sub-ch. 5. *Prather vs. Johnson*, 3 H. & J. 487; *Bowie vs. Connelly*, 6 H. & J. 141.

EARLE, J. delivered the opinion of the Court. We concur in the opinions expressed by the Court below, on both the bills of exceptions signed by them in this case, and we affirm their judgment.

The plaintiff below proved himself to have been the agent of Araminta Biscoe, in the settlement of George Biscoe's estate, on which she administered; and to show himself entitled to compensation for his services, as her agent, he offered in * evidence the receipts
 57 of two of the representatives of George Biscoe, deceased, which we think were properly suffered to be read to the jury for that purpose.

The copies offered were duly attested under the seal of the recording office, and appear to us to have been acknowledged and recorded agreeably to the Act of 1809, ch. 168. They were recorded in the office of the register of wills of Prince George's County, where George Biscoe died, and where of course letters of administration were taken on his estate, having been previously acknowledged before the said register.

It is objected, it does not appear that the representatives resided in Prince George's County, and the acknowledgment should have been made before a justice of the peace or register of wills of the county, where they resided.

The place of their residence does not appear on the face of the acknowledgment; but that they were in Prince George's County, at the time of making, it is clear, for else it could not have been made before the register of wills of that county. This indicates a temporary or transient residence, which we consider as sufficient; at least in the absence of proof of actual residence elsewhere. *Bryden vs. Taylor*, 2 H. & J. 396.

The Court in our judgment very properly refused the instructions as prayed in the second bill of exceptions, and discriminated well, between services rendered by the plaintiff in his official character of register of wills, and those performed by him in him in his private or

individual capacity. For the first he could charge nothing, except what the fee-bill allowed him, but as to the last, he is on a footing with every other individual in the community. There are many highly responsible and laborious duties an administrator has to perform, to which a register of wills, as such, has nothing to say; and if at the instance of an administrator, he undertakes to transact them, no reason is perceived why he should not be compensated for his services.

Judgment affirmed.

* RIDGELY vs. GITTINGS.—June, 1827.

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Where trustees appointed by a last will for the sale of real estate refused to act. J. was appointed by the Chancellor in their place, and having sold the estate, he claimed a commission for his trouble; but it appearing that he had waived all claim to commissions anterior to his appointment, and by a family arrangement, in which he was concerned, he was procured to be appointed trustee, on the express agreement that no commissions were to be charged—*Held*, that he was not entitled to any commission, but only to his actual expenses incurred in the execution of the trust.

(a)

APPEAL from the Court of Chancery. Mrs. Deborah Sterett on the 28th of July, 1812, duly made and executed, according to law, her last will and testament, whereby (among other things,) she gave and bequeathed to her four daughters, to be held for them in trust for their sole and separate use and disposal by her trustees, or the survivor of them, all the money that might be due to her from her son Charles, at her death, for the land that she had agreed to sell him, except \$1,000, which she gave to Charles' son John; and that her son Charles might have a good estate in fee simple, on payment of the purchase money, for which she allowed five years annual payments, with interest. She further gave and devised the said lands to her said daughters in fee, and in trust, that they and their heirs might be enabled to convey the same to the said Charles, and his heirs, when they were paid for; and the said testatrix, by her said last will and testament appointed Joseph Sterett and James Sterett, and the survivor of them, executors and trustees of her said will. The said testatrix on the 12th of February, 1813, duly made a codicil to her said last will, whereby, after mentioning and reciting the above bequest and devises to her daughters, she revoked the legacy to her grandson John, and gave to his father Charles S. Ridgely, an equal part with his four sisters. By an additional codicil to her will, the testatrix revoked the appointment of Joseph Sterett as one of the executors and trustees under the will for the purposes aforesaid, and appointed Samuel Hollingsworth, who refused to act; and the Chan-

(a) Cited in *Barry vs. Barry*, 1 Md. Ch. 22.

cellor subsequently appointed in his place, John S. Gittings, (the appellee,) who took upon himself the discharge of the trust.

A bill was filed to obtain a decree for the sale of the land for the payment of the legacies aforesaid, and a decree was passed * for
59 the sale of the premises upon certain terms, and with a stay. The auditor stated an account showing the amount due to the legatees aforesaid, and allowing to the trustees a commission of 5 per cent. Exceptions were filed to this report in July, 1821, and the case then rested until September Term, 1825, when the appellant filed his petition, alleging that having made a private sale of the land he was prepared to pay the amount due to the legatees, but objected to the allowance of any commission to the trustees.

Some testimony was taken under a commission, which is sufficiently stated in the opinion of the Chief Justice, delivered in this cause.

BLAND, C. (September Term, 1825.) The petition of Charles S. Ridgely, so far as relates to the commission claimed by the trustee, and the exceptions to the auditor's report of the 23d of June, 1821, standing ready for hearing, the counsel on both sides were heard, and all the proceedings were read and considered.

A trustee appointed by this Court to make sale of property directed to be sold is, so far, its executive officer or agent. He is in many respects considered in the light of a sheriff, acting in obedience to a Court of common law; and the commissions allowed to such a trustee are adjusted under the rule of this Court in a manner analogous to the poundage fees allowed to a sheriff. But in this case John S. Gittings, the trustee, can in no respect whatever be considered as a mere executive officer of this Court. The testatrix, Deborah Sterett, having disposed of her property in such a manner as to require one or two faithful agents to carry her intentions into effect, and to execute her last will and testament, she accordingly appointed two persons as executors and trustees for that purpose. One of those persons refused to act; in consequence of which this Court was called on and appointed John S. Gittings in the place of him who refused to act. John S. Gittings is then, not the executive agent of this Court, but the trustee or fiduciary of Deborah Sterett, acting for the benefit of those who are the objects of her bounty. And, therefore, as such, John S. Gittings is subject to all the burthens, and entitled

60 to all the benefits, which the * trustees actually named by the testatrix would have been liable to, or could have claimed. The amount of commission or allowance to such an executor or trustee should be the same in this Court as is directed by law to be allowed by the other tribunals of the State for the discharge of similar duties and functions. By the Act of 1798, ch. 101, it is directed, that executors shall be allowed not less than 5 per cent. This direction, in those cases, to the Orphans' Courts, is considered

a very strong indication, if not a positive command, as to what this Court ought to do in this case. But it is said, that this trustee did nothing, and in fact had not the least trouble in the sale of the land held by Charles S. Ridgely. It is evident, that in all cases a trustee or executor may have much trouble, and incur much greater risk with one part of the estate than the other. But under the Act of 1798, the commissions are allowed on the whole amount as a compensation for the aggregate amount of trouble and responsibility. It is believed the Court in no case makes any distinction as to the trouble and responsibility of the executor or trustee on the several parts of an estate, but determines that the established commission shall be allowed on all generally for all labor and risk. In this case the fiduciary responsibility was incurred for the whole, and, therefore, the trustees are entitled to commissions on the whole as estimated by the auditor. But a trustee or executor may waive or release his claim to commissions. And it is alleged, that the trustee, John S. Gittings, has done so in this case. The testimony, however, does not satisfactorily sustain the allegation; and, therefore, the exceptions to the auditor's report must be overruled. Ordered, that Charles S. Ridgely forthwith pay unto the trustee, John S. Gittings, the sum of \$595.98, being one-half of the commissions due to the trustees as stated by the auditor in his report. From which order Ridgely appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, ARCHER, and DORSEY, JJ.

R. Johnson, for the appellant, * referred to *Green vs. Winter*, 1 Johns. Ch. 27, and *Ringgold vs. Ringgold*, 1 H. & G. 11.

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Winchester, for the appellee.

BUCHANAN, C. J. delivered the opinion of the Court. The appeal in this case is not from the disallowance by the Chancellor of the exceptions taken to the account stated by the auditor, but from the Chancellor's order directing the appellant to pay to J. S. Gittings, one of the trustees, the sum of \$595.98, the amount of one-half of the commissions allowed to the trustees in the auditor's report. It appears from the account stated by the auditor, that commissions have been allowed to the trustees on the whole amount of the price of the land sold to the appellant by his mother. But as she bequeathed to him one-fifth part of that amount, with express authority to retain it, the part so bequeathed, constituted, in the opinion of this Court, no part of the trust fund, and consequently no commission could, we think, be properly charged upon it. And the amount ordered to be paid by the appellant, being made up in part of commissions charged upon that fifth, it is more than the appellee ought to be allowed, supposing him to be entitled to anything; which under the circumstances of the case, we cannot admit.

There can be no doubt that a trustee may waive his claim to commission, where that claim exists; and there may be circumstances under which no such claim can justly arise. This, it seems to us, is just that case. Independent of the fact that this trustee has in truth done nothing in relation to the trust, for which he merits remuneration, but that all has been left to be done by the appellant himself, the testimony set out in the record, sufficiently proves, we think, that he would have been entitled to none, beyond his mere expenses, if he had received the money and discharged all the other duties of the trust. Elizabeth Duckett swears, that in a conversation between Richard Gittings and Polly Gittings, (who were concerned,) and the appellee, she heard him say he would make no charge on the * trust reposed in him, further than his expenses;

62 that he expressly agreed to perform the duties of the trust without any compensation; and that the conversation took place the day on which Richard Gittings wrote to the Chancellor recommending the appointment of the appellee as a trustee. And James Gittings Ringgold swears, that on being asked by the son-in-law of Richard Gittings if he would undertake to act as a trustee, he agreed to do so for his expenses only, without any other compensation or commission; that he had held frequent conversations with the appellee concerning the trust he had accepted, in one of which he complained that the parties ought not to have expected of him to attend to the duties of the trust without compensation, on which he advised him to make known his views to the parties concerned, as they expected him to attend to the trust upon the terms on which, he the witness, had offered to undertake it; and that he had frequently heard the appellee admit that he had undertaken the trust on the terms proposed by himself.

These witnesses stand altogether uncontradicted, and without any kind of exception to their testimony, which without resorting to, or calling in aid, any of the other evidence taken in relation to this subject, clearly shows, not only that the appellee waived all claim to commissions anterior to his appointment, but that under a family arrangement, in which he was himself concerned, he was procured to be appointed a trustee on the express agreement and understanding that no commissions were to be charged. This agreement and family arrangement the appellee now seeks to violate, in which attempt he cannot, upon the evidence in the cause, be sustained.

Order of the Chancellor reversed.

ARCHER *vs.* WILLIAMSON.—June, 1827.

Awards are certainly not treated as strictly now as they formerly were; they are looked at with a more favorable eye, and more liberally construed; they still, however, must possess the fundamental properties of an

award. Among other things, they are required to be within the submission—certain to a common intent, and final.

The rule in relation to the construction of awards is, that presumptions are not to be raised for the purpose of overthrowing them; but that they are * to be liberally construed, so as to give effect and operation to the intention of the arbitrators where it can be done, and that every reasonable intendment is to be made in their support. **63**

Arbitrators cannot reserve to themselves the authority to act judicially upon the subject submitted, after their powers are put an end to by making the award; neither can they delegate to another any part of their judicial authority, which is personal to themselves, nor refer to another, the decision of a point on which they find a difficulty to decide themselves, and much less to the parties to the submission, or either of them. (a)

The reservation or delegation in an award of a power over the the thing submitted, shows the award not to be final, and consequently void; unless indeed, it relates only to some merely ministerial act.

Where the subject referred was one undivided matter, specifically brought to the notice of the arbitrators, on which they professed to act, and the purpose of the parties was to have a final determination of the whole matter submitted, an award comprehending a part only of the matter submitted, was held to be void.

APPEAL from Harford County Court. This was an action of debt, brought by the appellee, (the plaintiff in the Court below,) against the appellant, (the defendant in that Court,) on articles of agreement dated the 28th of February, 1822, for submitting certain matters to arbitration, &c. The defendant pleaded *nil debet*, with leave to each party to give the special matter in evidence. A case stated was agreed upon by the parties; and all errors in the pleadings were released. The Court below gave judgment for the plaintiff, and the defendant appealed to this Court.

The facts of the case sufficiently appear in the statement of the Chief Judge, who delivered the opinion of this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

Mitchell and *R. Johnson*, for the appellant, contended, that the award made under the articles of agreement upon which the suit was brought, was uncertain, not final nor conformable to the submission, and impossible to be performed. *Samon's Case*, 5 Coke, 78; *Baspole's Case*, 8 Coke, 98; *Kyd on Awards*, 176, 247; *Randall vs. Randall*, 7 East, 81; 1 Bac. Ab. tit. Arbitrament & Award, 218, 227; *Bussfield vs. Bussfield*, Cro. Jac. 577; *Jackson vs. De Long*, 9 Johns. 43; *Pedley vs. Goddard*, 7 T. R. 69, 73; 2 *Petersdorff*, 193; 2 *Chitty's Rep.* 594; *Blundell vs. Brettargh*, 17 Ves. 232, * 242; *Gourlay vs. Duke of Somerset*, 19 Ves. 429; *Milnes vs. Gery*, 14 Ves. **64**

(a) Cf. *Wilson vs. R. R. Co.* 11 G. & J. 58.

400; *Cooth vs. Jackson*, 6 Ves. 34; *Solomons vs. M'Kinstry*, 13 Johns. 27.

Taney and Scott, for the appellee, cited 2 *Petersdorff*, 169, 170, 171, 178, 249; *Kyd on Awards*, 129, 228, 229, 230, 231, 243, 202, 203, 204, 213, 214, 246, 244, 185, 186; *Caldwell on Arbitration*, 22, 25, 123, 126, 127, 107, 109, 492, 110, 115, 493; *Morgan vs. Mather*, 2 Ves. Jr. 16; *Dick vs. Milligan*, *Ib.* 23; *Munro vs. Alaire*, 2 *Caine's Rep.* 320; *Dig. Amer. Decisions*, 18, 22, 25, 26; *Solomons vs. M'Kinstry*, 13 Johns. 27; *Thornton vs. Carson*, 7 *Cranch*, 596; 1 *Com. Dig. (New Ed.)* 668, 669, (and notes;) *Goldsmith vs. Tilly*, 1 *H. & J.* 361; *Cromwell vs. Owings*, 6 *H. & J.* 10; *Richter vs. Chamberlin*, 6 *Binney*, 34; *Grier vs. Grier*, 1 *Dall.* 173; *Jackson vs. Yabsley*, 5 *Barn. & Ald.* 848; *M'Kinstry vs. Solomons*, 2 *Johns. Rep.* 57; *Jackson vs. Ambler*, 14 *Johns.* 96; *Simmonds vs. Swaine*, 1 *Taunt.* 549; *Pedley vs. Goddard*, 7 *T. R.* 73.

BUCHANAN, C. J. delivered the opinion of the Court. The appellant having contracted with the appellee, for the purchase of several contiguous tracts of land—Rough Stone, Maiden's Bower Secured, Paca's Industry, Rumsey's Neighbor, and two called Isaac's Delight, containing together by estimation 711 $\frac{3}{4}$ acres, at \$18 per acre, and the appellee believing them to contain a greater number of acres, they on the 28th of February, 1822, entered into a covenant, under seal, in the penalty of \$5,000, by which it was mutually agreed, that a resurvey of the lands should be made by two surveyors, one to be named by each of the parties, who should determine the actual contents of the lands, clear of elder surveys and adverse possessions, (with power to choose an umpire,) and whose decision should be conclusive and binding on the parties; a rateable addition or diminution in the amount of the purchase money to be made for any excess or deficiency that might be found in the quantity; on the condition, that unless the contemplated survey should be made and completed before the first of the following December, the parties should be bound and concluded by the estimate before made. On the 2d of

65 March, 1822, * the appellee executed a deed for the lands, to the appellant. On the 1st of June, 1822, two surveyors were appointed in pursuance of the agreement of the 28th of February, 1822. On the 29th of November, 1822, another agreement was entered into between the parties for extending the time for closing the award to the 15th of December, 1822, if it should be necessary. And on the 30th of November, 1822, the two surveyors signed and sealed an instrument of writing, purporting to be an award, which was delivered to the respective parties within the time limited by the agreement of the 29th of November; and in which, after reciting the purpose for which they were appointed, they say, they "do determine the whole quantity of the said lands required to be measured, clear as aforesaid, to be seven hundred and fifty-one acres, provided no deduction shall necessarily occur in consequence either

of the two tracts of land called Rough Stone and Jonathan's Inheritance, running into and interfering with each other; or of the resurvey called Maiden's Bower Secured not covering a part of the original survey called Maiden's Bower; that is, in the first instance, (as we have not before us the information requisite to determine those questions,) unless the said David Williamson shall obtain from the land office, or otherwise, an authentic document, record or authority, by which it shall be clearly ascertained that the tract called Rough Stone is entitled to priority of date and effect, so as to prevail over, and take away from Jonathan's Inheritance the part thereof included within the lines of the former, it is our judgment, that a deduction of eleven acres and three-quarters of an acre, shall be taken from the above recited quantity. Which document, record or authority, to be available, shall be obtained, and notice thereof given to the said Stevenson Archer on or before the first day of March next. And in the second instance it is our united judgment, that the said Stevenson Archer on his part, on or before the first day of March next as aforesaid, shall obtain and furnish the said David Williamson with an authentic document, of conclusive authority, whereby it shall be fully and clearly determined, that the conveyance heretofore by him made, for the land measured as aforesaid, is insufficient, void, and without the intended operation and effect in conveying any * part of the original tract called Maiden's Bower, which is not also covered by and included within the lines of the resurvey called Maiden's Bower Secured, if he shall continue determined to avail himself of any supposed advantage in this respect; and in case such conclusive evidence of such deficiency shall be furnished to the said David Williamson within the time hereinbefore limited, and he on his part shall refuse or neglect, until after the first day of June next, to execute or procure a further deed or other assurance, whereby the defect so ascertained shall be remedied, or a remedy provided for the same, then and in these events, fifteen acres and one-half acre shall in this respect be deducted from the quantity first determined, or from the residue in case the former deduction shall take effect as before mentioned; and otherwise not."

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It is admitted that the appellee never obtained from the land office, or otherwise, any such authentic document, record or authority, as is required by the award, in order to protect him from a deduction of eleven acres and three-quarters of an acre from the 751 acres, by reason of the interference of the lines of Rough Stone and Jonathan's Inheritance; and that the appellant never obtained or furnished to the appellee any such document as is required by the award, to show that the deed of conveyance from the appellee to him was insufficient to convey any part of Maiden's Bower, which was not included within the lines of Maiden's Bower Secured, so as to entitle him to a deduction of the 15½ acres mentioned in the award,

on account of their not being included within the lines of Maiden's Bower Secured, and of the appellee's neglect to execute or procure a further deed or assurance. According to the estimate at which the lands were originally sold by the appellee to the appellant, they contained $711\frac{3}{4}$ acres, $39\frac{1}{4}$ acres less than the arbitrators made out; which $39\frac{1}{4}$ acres were subject, on contingencies stated in the award, to deductions of $11\frac{3}{4}$, and $15\frac{1}{2}$ acres, making together $27\frac{1}{4}$ acres, leaving in the event of these deductions 12 acres more than the former estimate. The suit was brought for the penalty in the agreement, and the non-payment of the price of these 12 acres, and of the $15\frac{1}{2}$ acres, to a deduction of which the appellant did not, according to
 67 the award, show * himself to be entitled, making together $27\frac{1}{2}$ acres, and amounting to \$495, is assigned as the breach.

It is contended on the part of the appellant, that the award is bad; and on this the cause depends. Awards are certainly not treated as strictly now, as they formerly were; they are looked at with a more favorable eye, and more liberally construed; they still, however, must possess the fundamental properties of an award. Among other things, they are required to be within the submission, certain; that is, certain to a common intent, and final. The rule in relation to the construction of awards is, that presumptions are not to be raised for the purpose of overthrowing them; but that they are to be liberally construed, so as to give effect and operation to the intention of the arbitrators, where it can be done, and that every reasonable intendment is to be made in their support.

But has this award such characteristic features as entitle it to the favor of this Court?

The only matter submitted was the ascertainment of the actual contents of the several tracts of land sold by the appellee to the appellant, clear of elder surveys and adverse possessions, which was to be conclusive and binding on the parties, provided it was done by the 15th of December then next following, but not otherwise. Was that done? is the question. If it was, by any fair and reasonable construction of the award, there is an end to this appeal.

The award was made and delivered within the time limited; and what do the arbitrators say? Why, that the lands they were required to survey contain together 751 acres, provided no deduction shall necessarily occur in consequence either of the two tracts of land called Rough Stone and Jonathan's Inheritance, running into and interfering with each other, or, of the resurvey called Maiden's Bower Secured, not covering a part of the original survey called Maiden's Bower; and that they had not before them the information requisite to determine those questions. So far then it is very clear that nothing is determined; and if the arbitrators had stopped there, they would have left the parties to the submission, just where they set out—perfectly ignorant of the actual contents of the lands clear of elder surveys and adverse possessions, and the

award settling * nothing, would have been manifestly void. But the arbitrators, after professing that they have not the means of determining the questions, proceed to say, that 11½ acres shall be deducted from the 751 acres, unless the appellee shall obtain and give notice of it to the appellant, on or before the 1st of March, 1823, (two months and an half after the time limited by the submission for the ascertainment of the quantity,) some document, not specified or particularly referred to, nor even known by the arbitrators to exist, by which it shall be clearly ascertained that Rough Stone has such priority as to take from Jonathan's Inheritance that part of the latter tract which lies within the lines of Rough Stone. And that 15½ acres shall be deducted, provided the appellant shall procure and furnish to the appellee some document, not designated or known to be in existence, whereby it shall be clearly determined that the deed from the appellee to the appellant is insufficient to pass any part of the tract of land called Maiden's Bower, which is not included within the lines of Maiden's Bower Secured, the land conveyed, unless the appellee shall, on or before the first of June, 1823, execute or procure a further deed, to remedy the defect, so to be ascertained, but not otherwise. And time is also given to the appellant until the first of March, 1823, to produce the paper by which the insufficiency of the deed from the appellee is to be ascertained. Now this is not like the case of an award, by which a certain sum, or a certain act, is directed to be paid or done at a subsequent day; there the sum to be paid, or the act to be done, is definitely ascertained, and no judicial act remains to be done by the arbitrators. Nor is it within the principle of the case referred to in *Kyd on Awards*, 203, where the submission being in relation to a way leading to a house, it was awarded, that one should give a bond for £300 to the other, payable at the end of three years, and in case the way should be taken away, then that he should pay less by a certain sum; and if it should not, then that he should pay a certain sum more. There the exact sum to be paid, on the happening or not of the event, was ascertained and fixed, and the event on which the increased or diminished sum was to be paid, clearly and certainly designated, and nothing left to the will or caprice of either party in relation to the amount to be paid on the happening * or not of the event; nor anything left to be done by the arbitrators to give certainty to the award, in relation to the matter submitted and awarded; but all was certain on the face of it. Neither do we think it is like the case of *Thornton vs. Carson*, 7 *Cranch*, 596, much relied upon in argument, which was decided on the ground expressly taken by Judge Washington, who delivered the opinion of the Court, that there was no uncertainty in the award. But here the reduction of the quantity of land was made to depend not only upon the production or not (after the time limited for ascertaining the quantity,) of documents neither described nor par-

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ticularly referred to, but which were supposed by the arbitrators to be necessary to a decision of the question, whether such reductions should be made or not, but also on the effect and operation of those documents, when produced, depending upon their construction; which was a judicial act that the arbitrators could not reserve to themselves the authority to exercise, after their powers were put an end to by making the award; neither can arbitrators delegate to another any part of their judicial authority which is personal to themselves, nor refer to him the decision of a point on which they find a difficulty to decide themselves; and much less to the parties to the submission, or either of them.

Here we find the arbitrators declaring that they have not before them the information necessary to a decision of the only matter submitted to them—the ascertainment of the actual contents of the lands—and therefore declining to determine that single point of difficulty between the parties, for the adjustment of which alone the reference was made, and deferring it to a future period, after the time fixed by the terms of the submission for making the ascertainment; and causing it to depend upon the effect and operations of documents to be procured and respectively furnished by the parties to each other. Who was then to determine the effect and operation of those documents—the parties to the submission, or either of them, or the arbitrators? If the former, it was a void delegation of authority, and would be like the case of *Pedley vs. Goddard*, 7 T. R. 69, abridged in 2 *Petersdorff*, 174, where the arbitrators awarded that the defendant should pay to the plaintiff a

70 certain sum of * money, unless within a certain time, (which would not expire until after the time allotted for making the award,) the defendant should exonerate himself by affidavit from certain specified payments. Which was held not to be a final award, on the ground that the arbitrators, instead of determining themselves the points in dispute between the parties, had left one sum in dispute to be decided by the person, who, of all, was the least qualified to decide—the defendant himself. And if the latter, it was a reservation of authority which the arbitrators could not make. The very reservation or delegation of a power over the thing submitted, shows the award to be not final, and consequently void; unless, indeed, it relates only to some merely ministerial act which is not the case here. So far, then, as concerns the $11\frac{3}{4}$ acres, part of Rough Stone, which are also within the lines of Jonathan's Inheritance, and the $15\frac{1}{2}$ acres part of Maiden's Bower, but not within the lines of Maiden's Bower Secured, the award is void, not being certain and final. And as it respects the $15\frac{1}{2}$ acres, there is another objection equally fatal; it is not, we think, within the submission. The arbitrators could not have gone on the ground of any interference between the lines of Maiden's Bower and Maiden's Bower Secured, which would have applied as well to all the rest of the

original tract, as to the $15\frac{1}{2}$ acres. But they seem to have supposed that the whole of the original tract was intended to be included in the sale of Maiden's Bower Secured, (the resurvey,) and to have made their award on that principle; whereas, the latter tract alone was the subject of the contract, and no part of the original, not included by the lines of Maiden's Bower Secured; consequently no such part of the original constituted any part of the matter submitted. And if the award could be held good as to that part, it would be to make a contract for the parties, and to make the appellant pay for land that he never purchased. With respect to the 12 acres, not made subject to any future contingency, and of which separately, nothing is said in the award, it may be sufficient to remark, that there was a single and defined subject distinctly submitted to the judgment of the arbitrators, "the actual contents of the lands sold clear of elder surveys and adverse possessions," on the condition, that if the contemplated ascertainment should not be made and completed within the time limited * by the submission for that purpose, the parties should be bound and concluded by a former estimate mentioned and referred to in the agreement. That time was the 15th of December, 1822. The subject referred was one undivided matter, specifically brought to the notice of the arbitrators, and on which they professed to act. The purpose of the parties was to have a final determination of the whole matter comprehended within the submission, and not that it should be determined as to part, and left open and undetermined as to the residue; and that purpose is not obtained, if the award comprehends a part only of the matter submitted. On the 15th of December then, 1822, were the actual contents of the land sold "clear of elder surveys and adverse possessions," ascertained and determined? They certainly were not. By the aid of figures, to be sure, it may be ascertained that the arbitrators considered $723\frac{3}{4}$ acres as being clear of elder surveys and adverse possessions, making 12 acres more than the former estimate. But in relation to $27\frac{1}{2}$ acres they declined to make any decision, saying that they had not before them such information as enabled them to do so, and leaving that part of the matter submitted undetermined, and the parties, as to that, in the same state of uncertainty in which they were before the submission. The actual contents, therefore, of the lands, clear of elder surveys and adverse possessions, not being determined, the ascertainment of which, before the 15th of December, 1822, was the very condition of the submission, the award cannot be considered good as to the 12 acres only, and void as to the residue, but is void as to the whole.

Judgment reversed.

WOODS' Ex'r *vs.* FULTON & STARCK.—June, 1827.

The condition of an appeal bond to stay proceedings in equity, which contained a direct reference to the only decree passed by the Chancellor between the parties mentioned in the bond, must be construed in connection with the decree, in ascertaining its meaning.

An appeal by the representatives of a mortgagor, from a decree against them in favor of the mortgagee, for the sale of the mortgaged premises, unless the debt secured should be paid by a given day, and an appeal bond given by them to suspend execution of such decree, does not compel those representatives to guarantee the adequacy of the fund pledged by their ancestor, on an affirmance of the decree.

72 * In an action on the appeal bond, in such case, the measure of damages is the actual injury suffered by the appellee from the delay, in whatever manner it arises. If the fund pledged was unequal to the payment of the debt at the time of the decree, the intermediate accruing interest was a clear loss to the plaintiff, occasioned by the delay of the appeal, and might properly have been made a standard for measuring his damages. (a)

A decree, that unless the defendant shall, before a given day, pay to the complainant, or bring into Court to be paid to him, a certain sum of money, the mortgaged property mentioned in the proceedings should be sold, is a decree *in rem*. (b)

APPEAL from Baltimore County Court. This was an action of debt upon an appeal bond dated the 25th of October, 1816, executed by Thomas L. Savin, and others, with the defendant below, (whose executor the now appellant is,) as one of their sureties, to the plaintiffs, (the appellees,) reciting, that by a decree passed on the 6th of September, 1816, in a cause wherein the said Fulton & Starck were complainants, and the said Thomas L. Savin, and others, were defendants, the said defendants were decreed to pay to the said Fulton & Starck the sum of \$4,472.50, with interest, &c. From which decree the said Savin, and others, were about to appeal, &c. The condition then was, that if the said appellants should prosecute their said appeal with effect, and satisfy and pay to the said Fulton & Starck their, &c. as well the said sum of \$4,472.50, with interest as aforesaid, in manner directed by the said decree, in case the said decree should be affirmed, as also all costs which should be awarded by the Court of Appeals, then, &c. The defendant, (the appellant's testator,) pleaded general performance. To which the plaintiffs replied non-performance; and for breach assigned the non-payment of the amount of the decree which was affirmed in the Court of Appeals

(a) Approved in *Jenkins vs. Hay*, 28 Md. 563. Cf. *Karthaus vs. Owings*, 6 H. & J. 111.

(b) Approved in *Smith vs. Shaffer*, 46 Md. 579. Cited in *Keen vs. Whittington*, 40 Md. 498.

in June, 1818, and \$41.58 costs, there adjudged, &c. Rejoinder—performance and issue joined.

At the trial the plaintiffs, gave in evidence the record of a cause lately depending in the Court of Chancery, and carried up to the Court of Appeals, in which cause the plaintiffs in this action were complainants, and Wesley Woods, Thomas L. Savin, and Sarah his wife, and Marcus Dennison, were defendants. The decree was that unless the defendants paid the complainants \$4,472.50 with interest, &c. on or before, &c. the * mortgaged property mentioned should be sold, &c. And it is admitted by the defendant that the said record proved that the said complainants obtained a decree in said cause in Chancery, to wit, on the 6th of September, 1816, which decree is contained in said record, and that the present action is brought upon the appeal bond filed at the time of entering the appeal from said decree; and that after the affirmance of the said decree by the Court of Appeals on the 27th of June, 1818, as set forth in the said record, the said property mentioned in the said decree was on the 27th of July, 1818, duly and regularly sold by virtue of the said decree, for the sum of \$5,350; and that the report of the auditor, and the statement made by him dated the 7th of October, 1818, and confirmed by the Chancellor on the 8th of October, 1818, shows the manner in which the proceeds of the sale of said property were applied, viz.

Trustee's commission.....	\$224 00
Costs in Chancery.....	114 81
Costs in Court of Appeals.....	41 58
Auditor's fee.....	4 67
Fulton & Starck's claim to 27 July, 1818, \$5,784 43.	4,964 94
	<hr/>
	\$5,350 00
Amount of sales.....	5,350 00

Leaving a balance due to Fulton & Starck of \$819.49, with interest from the 27th July, 1818. And it was also admitted, that the costs of the Court of Chancery, mentioned in the said report and statement, including commissions allowed to the trustee of \$224, and auditor's fee \$4.67, are \$343.48, and that the costs of the Court of Appeals are \$41.58, and the costs of the record hereinbefore mentioned, and procured to be offered in evidence in this cause by the plaintiffs is \$20, and that the claim decreed to be paid to the plaintiffs was \$4,472.50, with interest, &c. making \$5,784.43; and that the amount of sales was \$5,350; leaving a deficiency on the 27th of July, 1818, between the said debt and interest, and the said proceeds of sales, of the sum of \$434.43. The defendant then prayed the opinion and direction of the Court to the jury, that upon the whole evidence, the plaintiffs were not entitled to recover a greater amount or * sum of money than the interest on the mortgage debt decreed to be paid, from the date of the decree, and costs

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of the Court of Appeals, as awarded by their decree of affirmance. Which opinion and direction the Court, [ARCHER, C. J. and HANSON, A. J.] refused to give, and gave the following direction: That the plaintiffs were entitled to recover as well the difference between the debt and interest, and the actual proceeds of sale, as all costs in the Court of Chancery, including the commissions of the trustee, and the auditor's fee, and also the costs of the Court of Appeals, and of the record aforesaid, as also interest on the said difference or deficiency. The defendant excepted; and the verdict being for \$1,002.86, and judgment thereon rendered for the penalty of the bond, &c. the defendant appealed to this Court; and his death being suggested after the appeal, the appellant, as his executor, appeared, &c.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

R. B. Magruder, for the appellant, cited *Dunkley vs. Van Buren*, 3 Johns. Ch. 331; *Taylor vs. Townsend*, 6 Mass. 264; * 2 Tidd's 75 Pr. 1131, 1132, 1074, 1075; *Zink vs. Langton*, 2 Dougl. 751, (note 3;) *Frith vs. Leroux*, 2 T. R. 59; *Contee vs. Findley*, 1 H. & J. 332; *Butcher vs. Norwood*, *Ib.* 485. The Acts of 1809, ch. 153, s. 4; 1713, ch. 4; 1793, ch. 75; 1819, ch. 103, s. 3; *Karthauss vs. Owings*, 6 H. & J. 139; *Lord Arlington vs. Merricke*, 2 Saund. 414; *Dance vs. Gilder*, 4 Bos. & Pull. 34; 1 Bac. Ab. 654. The Act of 1785, ch. 72, s. 3. *Bell vs. Brown*, 3 H. & J. 484.

Moale and *R. Johnson*, for the appellees, cited *Karthauss vs. Owings*, 6 H. & J. 139; *The State, use Rogers vs. Krebs*, *Ib.* 31; *Thompson vs. M'Kim*, *Ib.* 331, 333.

EARLE, J. delivered the opinion of the Court. The action instituted in this case in the Court below, is an action of debt on an appeal bond, against the appellant as surety. In the year 1811, one John M. Dennison mortgaged certain leasehold property in the City of Baltimore to Starck and Fulton, to secure them against any risk they might run by endorsing promissory notes in bank for Dennison & Savin, to the supposed amount of about \$3,000.

There was a proceeding in Chancery on this mortgage, in 1814, against Wesley Woods, the administrator of John M. Dennison, and Marcus Dennison, his son, about fourteen years of age, and Sarah Savin, his daughter, of full age, who had intermarried with Thomas L. Savin; and on the 6th of September, 1816, a decree was passed by the Chancellor, that unless the defendants, or either of them, shall before the 6th day of October following, pay to the complainants, or bring into the Court to be paid to them, the sum of \$4,472.50, with interest on \$4,462.75, part thereof, from the 7th day of September, 1813, until paid or brought in, the mortgaged property mentioned in the proceedings should be sold by a trustee, named in the decree.

On the 28th of October, 1816, the defendants appealed from this decree; and to suspend further proceedings, entered into the appeal bond, referred to in the record.

At June Term, 1818, of the Court of Appeals, this decree was * affirmed, and a sale of the mortgaged premises having been made by the trustee soon after, the same sold for \$5,350, a sum less \$819.49, than the amount of the mortgage debt, interest and costs, and the expenses attending the sale. This deficiency is the sum claimed by the appellees in this suit on the appeal bond; and whether the Court were correct in their instruction to the jury, to make this the measure and standard of damages to be found by them, is the question we are now called upon to examine and decide. **76**

This question makes it necessary for the Court to give a construction to the appeal bond, and to advert to the Act of Assembly, with a view to which it was framed. The condition of the appeal bond is in these words: "Whereas by a decree of the High Court of Chancery, passed on the 6th day of September, 1816, in a cause wherein the said David Fulton and George Starck, are complainants, and the said Thomas L. Savin, Sarah Savin, Wesley Woods, and Marcus Dennison, are defendants the above bound Thomas L. Savin, Sarah Savin, Wesley Woods, and Marcus Dennison, are decreed to pay to the said David Fulton and George Starck, the sum of four thousand four hundred and seventy-two dollars and fifty cents, with interest on four thousand four hundred and sixty-two dollars and seventy-five cents, part thereof, from the 7th day of September, 1813; from which said decree the aforesaid Thomas L. Savin, Sarah Savin, Wesley Woods, and Marcus Dennison, are about to appeal to the High Court of Appeals. Now the condition of the above obligation is such, that if the said appellants do and shall prosecute their said appeal with effect, and satisfy and pay to the said David Fulton and George Starck, their executors, administrators or assigns, as well the said sum of four thousand four hundred and seventy-two dollars and fifty cents current money, with interest as aforesaid, in manner as by the said decree is provided and directed, in case the said decree shall be affirmed, as also all costs which shall be awarded by the Court of Appeals, and in all things perform such decree as by the said Court of Appeals shall be made in the premises, then the above obligation to be void; otherwise to remain in full force and virtue."

* The condition of this bond has a direct reference to the only decree passed by the Chancellor between the parties, which must, therefore, be considered in connexion with it, in ascertaining its meaning. Taking them together, it is to be seen at the first glance, that a decree for the absolute payment of money is recited; whereas that appealed from, is a decree against an administrator and representatives, for the sale of mortgaged premises, and is unquestionably a decree *in rem*—One intimates a general judgment, that would involve the personal responsibility of the defend- **77**

ants, and subject their persons and property to execution; the other points to a specific adjudication, rendering liable a certain fund, out of which is to be raised the mortgage money of the complainants. The last is clearly the thing about which the contracting parties proposed to contract; and it will be in strict unison with the rules of construction, so to expound the first and more general terms, as to confine their meaning, and make them comprise no more than the object, which was within the immediate view of the parties. 2 *Com. on Cont.* 533.

To consider then this appeal bond, in the same way, as if it had truly recited the Chancellor's decree, the next inquiry is, what operation will it have thereon, in reference to the Act of 1713, ch. 4? It will certainly be a security for the costs, because they are within the express terms of its stipulations; and it having worked a suspension of proceedings in the Court below, it would seem a demand of justice, that the party delayed should be secured in a compensation for damages. But the interesting point is, by what criterion shall those damages be measured? This is not like the case of *Karthaus vs. Owings*, where this Court determine, on an appeal in replevin, that the value of the property to be returned should measure the damages sustained by the party.

There the appellant, by force of the judgment appealed from, had to do an act, the neglect to do which was injurious to the appellee. Here by the terms of the decree, the appellants may be considered as being passive, and bound to do nothing. Unless they pay or bring the mortgage money into Court by an assigned day, the day liable to be enlarged by the affirmance of the decree, the mortgage premises are to be sold; and as it is within their option to perform or not, their omission to pay or * bring the money into Court cannot

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be said to produce an injury or damage to the mortgagees.

If this is not the source of damage to the party, we clearly think it is not to be found in the deficiency of the fund to pay the mortgage debt and interest. The law does not compel those representatives to guarantee the adequacy of the fund, pledged by their ancestor; and there is nothing in their obligation, nor in the Act of Assembly in reference to which it was made, to oblige them to do it. In their stipulation to prosecute with effect, they have undertaken to proceed with their appeal to its successful termination; but in case of failure, they have not bound themselves to pay the debt, nor make good the fund; and this is not the legal and necessary consequence of a forfeiture of their bond. They are liable in damages for the actual injury suffered by the appellees from the delay, and this appears to the Court to be the legitimate ground on which to estimate damages; and we, therefore, are of opinion an error was committed in rejecting the interest on the debt, proffered by the counsel for the defendants. If the fund pledged was unequal to the payment of the debt at the time of the decree, the intermediate accruing interest

was a clear loss to the plaintiffs, occasioned by the delay, and might properly have been made a standard for measuring their damages.

We do not, however, mean to say, that a loss of interest was the only injury sustained by them. This is all in the case which to us has that appearance. It was certainly competent to the plaintiffs to have insisted on any further damage suffered by them, provided it was in their power to have shown that it proceeded from the suspension caused by filing the bond. Injury from delay seems to us the true test, and in whatever manner it arises, evidence of it in a case like this is fit and proper for the consideration of the jury.

Judgment reversed, and procedendo awarded.

* WALL'S EX'X vs. WALL.—June, 1827.

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The plea of limitations has been adjudged not to be a plea to the merits, and the universal practice has accordingly been never to permit it to be amended, and to demand that it should be filed by the rule day. It has never been received, unless by consent of the parties, by a mere docket entry of the plea, or otherwise than at length. (a)

There being several actions on the same bond, one against the principal—another against his surety, the same counsel acting for both, the plea of limitations being filed by him in one suit, he cannot direct the clerk of the Court to file a similar plea in the other *mutatis mutandis*, but the plea must be filed at length in both, for those suits, as to all questions of pleading, are as separate and distinct, as if they had been brought on different causes of action.

Where the subject decided by the inferior Court is left by law to their discretion, as in the refusal to grant a new trial, it has been adjudged that a writ of error will not lie. (b)

Where a Court has established rules for its government and that of suitors, fixing days for the filing of pleading, and where the long established practice of the Courts require special pleas to be drawn up and filed at length, there exists no discretion in the inferior Court to dispense at pleasure with their own rules, or to innovate upon such established practice; and a party injured by such a course has an undoubted right to seek redress in an Appellate Court. (c)

Where a defendant pleaded payment, and limitations, on which pleas issues were joined, and the jury found for the plaintiff on the first issue, and for the defendant on the second, the Appellate Court, having determined that the County Court erred in receiving the plea of limitations, reversed the judgment which that Court had rendered for the defendant, and gave judgment for the plaintiff.

(a) Approved in *State vs. Green*, 4 G. & J. 384; *Kunkel vs. Spooner*, 9 Md. 472; *Griffin vs. Moore*, 43 Md. 253. See *Lamott vs. McLaughlin*, 3 H. & McH. 197, 198, note.

(b) Approved in *Thomas vs. Doub*, 1 Md. 324.

(c) Approved in *Gist vs. Drakely*, 2 Gill, 346; *Abercrombie vs. Riddle*, 3 Md. Ch. 325; *Hughes vs. Jackson*, 12 Md. 463; *Quynn vs. Carroll*, 22 Md. 296; *Main vs. Lynch*, 54 Md. 668. See *Carroll vs. Barber*, 7 H. & J. 329, note.

APPEAL from Prince George's County Court. This was an action of debt on a bond for the payment of money. The defendant below, (the now appellee,) pleaded payment, and also the Act of Limitations, in the manner hereinafter stated.

At the trial it appeared that the plea of limitations, upon which the defendant wished to rely, had not been actually filed in the cause, but only in a preceding cause against the executors of the principal in the bond, in the declaration mentioned, (the said bond being joint and several, and several suits having been instituted thereon,) with instructions on the said plea, endorsed to the clerk, to file the same in the other suits *mutatis mutandis*; and it appeared further by the docket, that the entries in this case were the same as in the case against the executors of the principal, showing that the Act of Limitations had * been filed and pleaded at the same time. The

80 defendant further gave in evidence, by the record, that the plea of limitations in the suit against the executors of the principal, had been filed in time, by the plea day. The plaintiff objected to receiving the said plea in this manner, and insisted that inasmuch as the same had not been regularly filed in this cause by the plea day, and was not a plea to the merits of the cause, it could not now be received by the Court. But the Court, [STEPHEN, C. J., and KEY and PLATER, A. J.] were of opinion, and so decided, that the filing of the said plea in manner aforesaid, in the cause against the principal, was sufficient to entitle the defendant to the benefit thereof in this cause, in like manner as if the said plea had been actually and in due time filed in this cause, and that the same should be received, and that the plaintiff should reply thereto. The plaintiff excepted; and on the general replications being entered to the pleas of payment and the Act of Limitations, the jury found a verdict for the plaintiff on the first issue, and ascertained the sum due to the plaintiff on the bond. Upon the other issue they found a verdict for the defendant; and judgment was entered for the defendant. The plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DORSEY, JJ.

Mitchell, for the appellant. 1. The Court below erred in deciding that the plea of limitations was well pleaded, and in enforcing the rule replication to it. 2. Also in receiving the plea at all after the rule day, it not being a plea to the merits. 3. The receiving the plea in the manner it was received, being a departure from the general rules of practice; if it was authorized by any particular rule of the Court below, the rule should appear in the record. 2 *Bac. Ab.* 503; *Bennett vs. Holbeck*, 2 *Saund.* 317; *M'Fadon vs. Martin*, 3 *H. & McH.* 153; *Orme vs. Lodge*, 3 *H. & J.* 83; *Whetcroft vs. Dorsey*, 1 *H. & J.* 164; *Barnes vs. Blackiston*, 2 *H. & J.* 376; *Lamott vs. M'Laughlin*, 3 *H. & McH.* 324; *Benson vs. Davis*, 6 *H. & J.* 272.

* *R. Johnson*, for the appellee, referred to *Marine Ins. Co. of Alexandria vs. Hodgson*, 6 *Cranch*, 206; *Liter vs. Green*, 2 *Wheat*. 306; and the Act of 1785, ch. 80, s. 4. 81

ARCHER, J. delivered the opinion of the Court. The plea of limitations has been adjudged not to be a plea to the merits; and the universal practice has accordingly been, never to permit it to be amended, and to demand that it should be filed by the rule day. It has never been received, unless by the consent of the parties, by a mere docket entry of the plea, or otherwise than at length. The rules which govern the practice of the Court of Prince George's County, are not made part of the record; yet it is apparent from the bill of exceptions, and the opinion of the Court therein expressed, that the plea is required in that Court to be filed at length, and by the rule day; for the Court have founded their opinion on the idea that the filing of the plea, with the attorney's directions, by the rule day, in the suit against Berry, the principal, was equivalent to the plea of limitations being filed in this suit, at large, and by the rule day.

There is no evidence of any assent that the plea should be received short, or by a mere docket entry of limitations, and there is clearly no other plea filed here. The plea is filed regularly and at length in the suit against Berry, the principal, but not in this; and as to all questions of pleading, they are as distinct and separate suits as if they had been brought on different causes of action, and not on the same instrument. It cannot be pretended that a general direction by an attorney to file a plea of limitations in all his cases, is to operate as such plea, whether it shall have been filed at length or not; and yet the principle of such a case would be precisely that of this. It may be a practice calculated to relieve the profession of some labor, but it is entirely too loose to subserve the purposes of justice, and we conceive ought not to be sanctioned.

It has been contended that the reception of the plea of limitations in the manner it was done, could not be assigned for error. It is certain that where the subject decided by the inferior Court is left by law to their discretion, as in the refusal to grant a new trial, it has been adjudged that a writ of error will not lie. But where a Court has established rules for its government * and that of 82
sutors, fixing days for the filing of pleadings; and where the long established practice of the Courts require special pleas to be drawn up and filed at length, there exists no discretion in the inferior Court to dispense at pleasure with their own rules, or to innovate upon such established practice; and a party injured by such a course has an undoubted right to seek redress in this Court. Every suitor is interested in the interpretation of the rules of Court applicable to his case; and an erroneous judgment of the County Court in relation

to them may, in many cases, be as vitally injurious to him as a wrongful judgment upon the law which may govern his case.

The plea of limitations having been objected to should not have been received; but the proceeding upon this issue can in no manner affect the verdict of the jury on the plea of payment, which having been given for the plaintiff, the Court below should have given judgment for him.

The judgment below is reversed, and this Court direct judgment to be entered on the verdict for the plaintiff.

Judgment reversed, &c.

BIRCKHEAD vs. SAUNDERS' Ex'r.—June, 1827.

Judgment was obtained against B. W. and R. as administrators of B. which was entered for the use of S. The defendants appealed, and filed an appeal bond to S. as the obligee, reciting an appeal from a judgment rendered against B. W. and R. The judgment appealed from being affirmed by the Appellate Court, in an action on the appeal bond, the plaintiff assigned, as a breach of the condition, the affirmance aforesaid, and that the judgment affirmed and that mentioned in the bond were the same. The defendants rejoined they were not the same; on which the parties joined issue—*Held*, that after oyer the bond declared on became parcel of the record, and it then appeared judicially to the Court, that the judgment recited in the bond upon which the plaintiff had declared, was not the same as that relied upon in his replication, and of course the record of the affirmed judgment above mentioned, was inadmissible in evidence under the issue joined. (a)

APPEAL from Harford County Court. This was an action of debt, brought on an appeal bond executed by the appellant, and others, on the 5th of February, 1822, to the appellee's testatrix, * re-
83 citing that Charlton Waltham, and Hester his wife, administratrix of James H. Taylor, for the use of Elizabeth Saunders, obtained judgment in Harford County Court at August Term, 1821, against the said Elizabeth Birckhead, and others, for the sum of, &c. from which judgment the said Elizabeth Birckhead, &c. have prayed an appeal. The condition was in the usual form, that if the said

(a) Cited in *Brown vs. Jones*, 10 G. & J. 345; *Tucker vs. State*, 11 Md. 329; *Coulter vs. Trustees*, 29 Md. 74. In *Brown vs. Jones*, it was held that the profer of letters of administration places them in the hands of the Court, of whom oyer is craved, and not of the party; and being in possession the Court must be assured, by an inspection of the letters, of the right of the party to sue, and of the jurisdiction of the Court granting them. In *Tucker vs. State*, it is said that by profer of the bond, and the grant of oyer of the bond and condition, they are made parts of the declaration. By Rev. Code, Art. 64, sec. 84, sub-sec. 106, it is provided that it shall not be necessary in any case to make profer in a declaration or plea, but the opposite party shall be entitled to oyer in the same manner as if profer were made.

Elizabeth Birckhead, &c. should prosecute their appeal with effect, &c. then the bond to be void. The defendant, after craving oyer of the bond, pleaded general performance. The plaintiff replied non-performance; and by way of breach stated, that after the making of the said writing obligatory, and before the issuing of the writ in this case, it was in the Court of Appeals at June Term, 1823, adjudged that the judgment rendered in Harford County Court, wherein Charlton Waltham, and Hester his wife, administratrix of James H. Taylor, use of Elizabeth Saunders, were plaintiffs, and the said Elizabeth Birckhead, &c. were defendants, should be affirmed, &c. and that the judgment last above mentioned, so affirmed as aforesaid, is one and the same judgment mentioned, recited and referred to, in the condition of the bond upon which this action is brought, &c. Also an averment of non-payment, &c. The defendant rejoined, that the judgment in the replication is not the same judgment mentioned and referred to in the condition of the said bond—Issue joined.

At the trial the plaintiff offered in evidence the records and docket entries of Harford County Court of August Term, 1821, from which it appeared that a judgment was rendered at that term in that Court in favor of Waltham and wife, administratrix of Taylor, for the use of Elizabeth Saunders, against Elizabeth Birckhead, and others, administrators of Thomas A. Birckhead, for, &c. That on the 9th of February, 1822, an appeal was prayed by the defendants, which was allowed, and on the same day the bond, on which this action was brought, which was proved and read in evidence, was filed, being endorsed as approved, &c. by the Chief Judge of the district. The plaintiff also proved that there was no other judgment rendered in the said Court at the said term in favor of Waltham * and wife, administra-
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 trix of Taylor, use of Elizabeth Saunders, against Elizabeth Birckhead, &c. nor was any other judgment rendered of that term at all in favor of the same plaintiffs, nor against the same defendants, either in their individual or representative characters. And further, that no execution was issued in the said cause, first above mentioned. The plaintiff further offered in evidence an exemplification of the record of the Court of Appeals, under seal of the said Court, duly certified by the clerk thereof, in the cause of Elizabeth Birckhead, &c. administrators of Thomas H. Birckhead, against Charlton Waltham, and Hester his wife, administratrix of James H. Taylor, use of Elizabeth Saunders, in the Court of Appeals, wherein judgment of affirmance was given on the 12th of July, 1823. To the admission of all which evidence the defendant objected; but the Court, [ARCHER, C. J.] overruled the said objection, and permitted the evidence to be given to the jury; and it was accordingly given. The defendant excepted. Verdict, that the judgment mentioned in the replication is the same judgment mentioned and recited, and referred to, in the condition of the writing obligatory aforesaid; and

the jury find the sum of \$704.52½ is really and justly due to the plaintiff on the writing obligatory aforesaid. Judgment for the penalty, to be released, &c. From which judgment the defendant appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

85 *R. Johnson and Gill*, for the appellant, * cited *Harwood vs. Rawlings*, 4 H. & J. 126; *Wilmer vs. Harris*, 5 H. & J. 1, 2, (and note;) *Morgan vs. Blackiston*, *Ib.* 61; *James vs. Lawrence*, 7 H. & J. 73; *Johnson vs. Goldsborough*, 1 H. & J. 499; *Norwood vs. Martin*, 3 H. & J. 199; 1 *Chitt. Plead.* 232, 571, 572. The Acts of 1713, ch. 4, and 1763. ch. 23. *Creager vs. Brengle*, 5 H. & J. 234, 239.

Mitchell, for the appellee, cited 1 *Chitty's Plead.* 572, 581, (note,) 603, (note b,) 610; 2 *Chitty's Plead.* 418, (note t,) 409, (note g,) 626, 627, (notes y, z;) *Com. Dig. tit. Pleader*, (2 W 13;) *Lord Proprietary vs. Gibbs*, 1 H. & McH. 58; *Hendricks vs. Commercial Insurance Company*, 8 Johns. 8; *Pitt vs. Knight*, 1 Saund. 92; *Cutler vs. Southern*, *Ib.* 115; *Stafford vs. Clark*, 9 Serg. & Low. 437; *Kyd on Awards*, 205; *Postern vs. Hanson*, 2 Saund. 60, (note;) *Mauleverer vs. Hawxby*, *Ib.* 79.

STEPHEN, J. delivered the opinion of the Court. On the trial of this cause in the Court below, the plaintiff, to sustain the issue on his part, offered in evidence to the jury, the records and docket entries of Harford County Court of August Term, 1821, from which it appeared that a judgment was rendered at that term in said Court, in favor of Charlton Waltham, and Hester his wife, administratrix of James H. Taylor, for the use of Elizabeth Saunders, against Elizabeth Birckhead, John Watters and James Reardon, administrators of Thomas A. Birckhead, for \$1,000 penalty, and costs; to be released on the payment of \$500, with interest from the 16th of November, 1813, until paid, and costs. That from this judgment an appeal was prayed to this Court by the defendant, and the appeal bond filed on which this suit was brought. The judgment recited in

86 that bond was stated to have been rendered against * Elizabeth Birckhead, and the other defendants, in their individual and not in their representative capacities, and it was for the payment of the recited judgment only that the bond was given, if the Court of Appeals should so adjudge. To the declaration filed upon that bond, after oyer prayed and granted, the defendant pleaded performance; the plaintiff in his replication assigns as a breach of the condition of the bond, the affirmance and non-payment of a judgment obtained against the appellants in their representative character, with an averment that it was the same judgment as that recited in the condition of the bond; the defendant rejoined that it was not the same judgment, and upon the issue so formed the parties went to trial.

The defendant objected to the admissibility of the evidence so as aforesaid offered to the jury, but the Court overruled the objection, and permitted the evidence to be given to the jury. In granting such permission it is the opinion of this Court, that the Court below erred, even if the issue which the jury were called to try had been legally and properly submitted to their determination; which, for reasons that will hereafter be assigned, we think it was not.

The judgment offered in evidence was inadmissible, because it was irrelevant, and did not tend to support the issue joined between the parties, and ought consequently to have been rejected. The plaintiff in his declaration, made a *profert* of the bond; this by legal intendment put the bond itself in the possession of the Court, and the defendant prayed and obtained from the Court oyer of the bond, which made it a part of the plaintiff's declaration, and also matter of record. In 5 *Bac. Ab. tit. Pleas and Pleadings*, 438, the following principles are laid down: "When a deed is pleaded with a *profert hic in curia*, the very deed itself is by intendment of law immediately in the possession of the Court; and, therefore, when oyer is craved, it is of the Court and not of the party; and after oyer is craved, the deed becomes parcel of the record, and the Court must judge upon the whole;" and that "if the defendant prays oyer of the bond and condition, and it is entered *in hæc verba*, the condition becomes parcel of the plaintiff's declaration." It then appeared judicially to the Court that the judgment recited in the bond, upon which the plaintiff had declared, was not the *same judgment as that relied upon in the plaintiff's replication, and of course it was inadmissible to prove the issue joined between the parties. 87

But the defendant; instead of denying the plaintiff's averment as to the identity of the judgment, and thereby creating an issue in fact for the jury to try, ought to have pleaded *nul tiel record*, which would have brought the question before the Court who were the proper tribunal to have decided it; or he might have demurred to the replication, as the breach therein set forth was not within the condition of the bond, upon which the plaintiff had declared. *Snell vs. Snell*, 10 *Serg. & Lowb.* 457, where the law is stated to be that, "If a plaintiff states the legal effect of a deed, the defendant has a right to see it on oyer, and if the meaning varies from that attributed to it in the declaration, in order to take advantage of that variance, he should plead *non est factum*, without setting out the deed. If it does not support the breach, he should set it out and demur."

Judgment reversed.

HOLLINGSWORTH'S Adm'x vs. FLOYD et al.—June, 1827.

Where two are liable on a joint and several obligation, and several judgments are obtained against each, which are severally superseded, if one

pays the whole sum he is entitled to an assignment of the original judgment against the other, which he can use by way of execution against the other to the extent for which he was that other's surety; but he is not entitled to an assignment of the supersedeas judgment against the other, for that would make other persons liable to the surety, whose responsibility was not contemplated when he became surety for his principal. (a)

An appeal will lie for the party aggrieved by the decision of a motion to set aside an execution. (b)

Where an execution is properly issued for a part of the sum for which it is laid it is error for the Court to quash it altogether. (c)

By the Act of 1768, c. 28, a surety, on the payment of a judgment against his principal, is entitled to an assignment of the judgment from the legal plaintiff. (d)

A surety on paying a judgment of his principal may in equity compel the creditor to assign the judgment with all liens given by the principal.

A payment in full by a surety has been adjudged of itself to operate as an assignment, so as to enable him to use the name of the creditor to recover the sum from his principal. (d)

A payment of part of a debt by a surety does not entitle him to an assignment of the creditor's securities *pro tanto*. (e)

88 * APPEAL from St. Mary's County Court. It appears that a writ of *fieri facias* issued out of that Court on the 12th of August,

(a) Approved in *Semmes vs. Naylor*, 12 G. & J. 362, and *Smith vs. Anderson*, 18 Md. 526. In the latter case it is said: "If a judgment be rendered against A., B. and C., A. being principal and B. and C. his sureties, and afterwards the judgment be superseded by A., B. and C. the original defendants, with D. and E. as sureties; in such case D. and E. are sureties for A., B. and C. who, as to D. and E., are all principals. The sureties of the original debtor are not co-sureties with the new parties on the *supersedeas*, in the sense in which the term co-surety is used in the law with reference to the right of contribution. It is true that in one sense all are sureties for the principal debtor for the same debt; but as between themselves, the obligation of the latter is subsequent and secondary to that of the former. This proposition is very clearly expressed in the opinion delivered by EARLE, J. in the case of *Hollingsworth vs. Floyd*, and although not directly involved in the case, or strictly necessary for its decision, we are all of opinion that the law as announced in the opinion of the learned Judge was sound, and supported both by reason and authority."

(b) Cited in *Green vs. Hamilton*, 16 Md. 328, and *Greff vs. Fickey*, 30 Md. 78. Cf. *Harris vs. Wilmer*, 5 H. & J. 1.

(c) Cited in *Harris vs. Alcock*, 10 G. & J. 251, where the Court said: "The simple fact of issuing an execution for more than is due on a judgment, does not *per se* render the execution fraudulent and void. It is by the *quo animo* with which it is issued, that its validity is to be tested; if issued with a fraudulent intent it is void, but if issued *bona fide*, it is not void, and will be available to the plaintiff to the extent of the debt remaining due on the judgment."

(d) Approved in *Orem vs. Wrightson*, 51 Md. 44. See Rev. Code, Art. 64, s. 46; Act of 1880, c. 161; *Norwood vs. Norwood*, 2 H. & J. 208; *Sotheren vs. Reed*, 4 H. & J. 246; *Creager vs. Brengle*, 5 H. & J. 190.

(e) Cited in *Grove vs. Brien*, 1 Md. 454; *Neptune vs. Dorsey*, 3 Md. Ch. 338.

1822, on a confession of judgment, by way of *supersedeas*, entered into on the 1st of May, 1820, by the defendants, to stay execution on a judgment rendered at March Term, 1820, in the name of the plaintiff, against Joseph P. Floyd—which *fiери facias* was endorsed for the use of William Floyd, and made returnable to March Term, 1823. The sheriff returned the *fiери facias* “levied as per schedule, and sold to William Floyd, September 25th, 1822, for \$580.” The schedule referred to was of the following lands taken as the property of Joseph P. Floyd, one of the defendants, viz. “One-fourth part of Prevention, 86 acres, is 22 acres. One-fourth part of Wolfpit Levels, 80 do. is 20 do. One-fourth part of Jenkins’ Neck, 87 do. is 22½ do. One-fourth part of Cuthbert’s Pasture, 200 do. 50 do. One-fourth part of Beaverdam, 10½ do. is 2½ do. One-fourth part of the Water Mill,” &c. The whole appraised to \$383.95½. Motion was made by the defendants to quash the *fiери facias* and return, &c. and a rule was laid on the plaintiff to show cause, &c.

The defendants, in support of the motion and rule, produced a record of the judgment rendered at March Term, 1820, by the plaintiff, for the use of William Floyd, against Joseph P. Floyd, and a confession of judgment entered into on the 1st of May, 1820, by the said Floyd with Henry Abell and Edward Spalding, Junior, for staying execution of the above judgment, &c. Also a record of a judgment rendered at March Term, 1820, by the plaintiff against William Floyd, upon a bond entered into by Joseph P. Floyd and William Floyd, jointly and severally, on the 15th of June, 1813, to T. Hollingsworth, deceased, being the same cause of action, and the judgment rendered for the same amount of debt as mentioned in the record of the judgment against Joseph P. Floyd. The judgment against William Floyd was also superseded by him, with Henry Abell and Edward Spalding, Jr. on the 1st of May, 1820. The defendants then swore as a witness Gerard N. Causin, who stated that a part of the money, upwards of \$1,000, mentioned in the said writing obligatory, on which several judgments had *been obtained against the defendant and William Floyd, had been 89 paid to him as counsel or the plaintiff by the said William, after the rendition of said judgments. That at the time the money was paid by the said William, as aforesaid, he alleged that he was only security in the said writing obligatory; and it was then understood and agreed between the said William, and the witness, as counsel for the said plaintiff, that the said judgment against the said defendant (Joseph P. Floyd,) should be entered for the use of the said William; which agreement was carried into effect by the witness as counsel of the said plaintiff. To the admissibility of which testimony the plaintiff objected; but the Court [STEPHEN, C. J., KEY and PLATER, A. J.] overruled the objection, and received the said testimony, and ordered the said execution to be quashed. The plaintiff excepted;

and the writ of *fiery facias* and return being quashed, the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE and MARTIN, JJ.

Magruder, for the appellant, contended, that no sufficient reason was shown for the judgment of the Court below. He referred to *Berry vs. Nicholls*, 2 H. & J. 508; *Merryman vs. The State*, 5 H. & J. 423.

C. Dorsey, for the appellees, cited *Sotheren vs. Reed*, 4 H. & J. 305; *Norwood vs. Norwood*, 2 H. & J. 238; 1 *Wheat. Selic. N. P.* 425; 1 *Inst.* 232 a.

EARLE, J. delivered the opinion of the Court. The appeal is taken in this case from a judgment of Saint Mary's County Court, on a motion to set aside an execution. The testimony produced by the defendants, in support of the motion, is drawn up in the form of a bill of exceptions, and is signed by the Judges. From this, and the record, it appears that Joseph P. Floyd and William Floyd, passed a joint and several obligation to T. Hollingsworth for \$1,061.25, with interest; that suits were brought on this obligation against them separately, and prosecuted to judgments; that each of those judgments were by them superseded, and that Henry

90 Abell and Edward * Spalding, Junr. were superseders for both of them; that after the supersedeas judgments were entered into, William Floyd paid upwards of \$1,000 of the debt, and by an arrangement with the plaintiff's counsel, issued for his use, a *fiery facias* on the supersedeas judgment of Joseph P. Floyd, against him and his superseders, telling the counsel, who was a witness for Joseph P. Floyd, that he was surety in the obligation to T. Hollingsworth, and wished reimbursement; and it appears that the *fiery facias* was laid on the property of Joseph P. Floyd, which was sold by the sheriff, and purchased in by William Floyd. The *fiery facias*, thus executed, was quashed by the Court; and the plaintiff having excepted, now claims to have the judgment reversed by us. And were the Court below wrong in ordering the *fiery facias* to be quashed? is the question to be determined.

By the arrangement between William Floyd, and the counsel of Ann Hollingsworth, administratrix of T. Hollingsworth, it would seem as if the process was issued for the benefit of both of them. Although the payment made was a handsome one, it was but a partial payment, and left a balance due to Ann Hollingsworth, which it cannot be supposed her counsel intended to transfer to another, even if he had the power to do so. As to this balance then, the Court were decidedly in error, in ordering the *fiery facias* to be quashed. And it remains to be inquired, whether they were right as far as the interest of William Floyd was concerned? The infor-

mation of the situation of William Floyd in relation to the bond, is derived from himself, but it is made testimony by the examination of the adverse party, and he will be considered by us as surety of Joseph P. Floyd, in our farther examination into this subject. Payments by sureties are highly favored by our laws, and have been most liberally dealt with by this Court. A payment in full entitles a surety to an assignment of the judgment against the principal, by the Act of 1763, ch. 23. Upon established principles of equity, he has a right, in a Court of Chancery, to call on a creditor for an assignment of the judgment, and all liens which the principal has given to the creditor; and by several decisions in this Court, a full payment by a surety has been adjudged of itself to operate as an assignment, so as to enable * him to use the name of the creditor, to recover the money of his principal. The cases of *Norwood vs. Norwood*, *Sotheron vs. Reid*, and *Merryman and others vs. The State, at the instance of Harris, use of Murray*, were adjudicated on this principle. The several debts referred to by them, were considered as assigned by the mere operation of law, to effectuate the purposes of justice between the parties, and accordingly executions were issued, and recoveries had, in the name of the creditors, for the use of the sureties, against the principals. The same principle would be applied to the case before us, if there were not one or two distinguishing marks of difference between it, and the cases thus decided. The payment of the entire debt was not made by William Floyd, and the proceeding is upon the supersedeas judgment of Joseph P. Floyd, and not on the judgment confessed by him to the administratrix of T. Hollingsworth. It would not subserve the ends of justice to consider the assignment of an entire debt to a surety as effected by operation of law, where he had paid but a part of it, and still owed a balance to the creditor; and this Court would not countenance such an anomaly as a *pro tanto* assignment, the effects of which could only be to give distinct interests in the same debt to both creditor and surety. We must then entertain the opinion, that the Court were right in quashing the execution so far as William Floyd's interest in the debt was concerned. The process was moreover issued upon the supersedeas judgment against Joseph P. Floyd, and his superseders, Henry Abell and Edward Spalding, Junr. on whom William Floyd in justice could have no claim. If he had satisfied the whole debt, we should have said he was entitled equitably to an assignment of the judgment against his principal, and all liens which the principal had given to the creditor; but beyond this we should have been indisposed to have gone. We could not have rendered other persons liable to William Floyd, whose responsibility was in no sort contemplated, when he entered surety for his principal. Abell and Spalding indeed became superseders to William Floyd himself, on the judgment rendered against him, at the same time they entered into this

engagement for Joseph P. Floyd; and thus it appears they rightly considered both judgments for the same debt, and doubtlessly
92 looked for * indemnity against loss, as well to William Floyd as to Joseph P. Floyd.

The execution, however, having been quashed to the prejudice of the rights of Ann Hollingsworth, administratrix of T. Hollingsworth, the judgment must be reversed. *Judgment reversed.*

BERRY vs. SCOTT.—June, 1827.

In an action by a physician to recover compensation for his professional services, the defendant cannot avail himself of the provisions of the Act of 1821, ch. 217, unless the notice required by that Act had been given.

The Act of 1821, ch. 217, which declares, “that from and after the passage of this Act, no person or persons not authorized to practise medicine and surgery by the laws of this State shall have power to recover any fees or other remuneration for medicine given or disposed of, or for any services rendered or performed in the practice of medicine or surgery or both, provided that the defendant shall give ten days notice to the plaintiff or his attorney, that he intends to dispute the claim,” embraces all cases, where the attempt to recover was subsequent to its passage.

APPEAL from Prince George’s County Court. This was an action of assumpsit for work and labor, care and diligence, of the plaintiff, (now appellee,) as a physician, performed for the defendant, (the appellant,) on the 25th of November, 1821, and a *quantum meruit* for the like services, &c. The writ was issued on the 6th of August, 1822. *Non assumpsit* pleaded, and issue joined.

At the trial the plaintiff offered evidence to prove, that he had rendered medical services to the defendant, by visiting and administering medicine to his family, as set forth in the declaration; but produced no evidence that he had practised physic or surgery before the year 1800; or that he had been licensed to practise physic or surgery by the medical or chirurgical faculty of the State of Maryland; or that he at the time practised physic or surgery in any other State. Whereupon the defendant prayed the opinion of the Court, and their direction to the jury, that from the pleadings and evidence, the plaintiff was not entitled to a verdict, because of the
93 statutory * prohibition of the practice of physic and surgery, for compensation, without a license. But the Court, [KEY and PLATER, A. J.] refused to give the opinion as prayed. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE and MARTIN, JJ.

J. Johnson, for the appellant, referred to the Acts of 1798, ch. 105, s. 6; 1801, ch. 55, s. 1, 2; 1818, ch. 130, and 1821, ch. 217, which passed on the 19th of February, 1822. *The People vs. Utica Insurance Company*, 15 Johns. 358, 380; 5 Com. Dig. 261; 6 Bac. Ab. tit. Statute, 391; *Hallett vs. Novion*, 14 Johns. 273, 288; 2 Stark. Evid. 31, 374; *Rex vs. Smith*, 3 Burr. 1475; 1 Stark. Evid. 378.

Stonestreet and J. Forrest, for the appellee, cited 3 Stark. Evid. 378, 379; *Hartwell vs. Root*, 19 Johns. 345; *Rex vs. Rogers*, 2 Campb. 654; *Jackson vs. Shafer*, 11 Johns. 513. The Act of 1821, ch. 217. 4 Stark. Evid. 129, 130, (and note.)

MARTIN, J. delivered the opinion of the Court. We think the Act of 1821, ch. 217, conclusive upon this case. By that Act it is declared, "that from and after the passage of this Act, no person or persons, not authorized to practise medicine and surgery by the laws of this State, &c. shall have power to recover any fees, or other remuneration, for any medicine given or disposed of, or for any services rendered or performed in the practice of medicine or surgery, or both, in any of the Courts of law, or before any justice of the peace of this State; Provided that the defendant shall give ten days notice to the plaintiff or his attorney, that he intends to dispute the claim." This Act went into operation on the 22d of February, 1822, and *embraced all cases where the attempt to recover was subsequent to that time. The writ in this case issued in August, 1822, and the defence set up could not be sustained, unless the notice required by the Act had been given. 94

Judgment affirmed.

DAVID *et al.* vs. GRAHAME.—June, 1827.

On a bill for the sale of land mortgaged to secure the payment of a sum certain with interest, where the defendants admitted in their answer the original debt and mortgage, claimed no other credits than those allowed in the bill, and consented to a sale for the payment of the balance due to the complainant, the necessity for a decree to account, in order to ascertain the sum due before a sale was decreed, does not exist. (a)

In a proceeding for the sale of the real estate of a person dying without leaving personal property, sufficient for the payment of his debts, it is necessary to make the executor or administrator of the deceased debtor a party. (b)

(a) Distinguished in *Wylie vs. McMakin*, 2 Md. Ch. 416.

(b) See Rev. Code, Art. 66, s. 1; *Tyler vs. Bowie*, 4 H. & J. 270, note; *Carey vs. Dennis*, 13 Md. 1; *Piper vs. Hamilton*, 26 Md. 208; *Lynn vs. Gephart*, 27 Md. 547. The purchaser from a devisee is bound to take notice of the exist-

Where a creditor is under no obligation to look to the personal estate of his debtor, as where he is seeking to subject to the payment of his debts a fund on which he has a specific lien, and with which the executor or administrator has nothing to do, he need not be made a party in such proceeding.

Under the 3d section of the Act of 1785, ch. 72, a defendant is ordinarily entitled to have a day given him, to bring in money on a decree for the sale of mortgaged premises; yet that being for his benefit, he may waive it; and where the answer confesses the complainant's claim, and consents to a sale for the payment of it, on such terms as to the Court should appear equitable, he is to be considered as having waived that benefit. (c)

Where the Court in their decree direct a sale of mortgaged premises to be on a credit of twelve months, it is equivalent to a day being given to a defendant for the payment of the debt due by him.

APPEAL from a decree of Calvert County Court, sitting as a Court of Equity. The bill of the complainant, (now appellee,) filed on the 7th of October, 1825, stated that Joseph David, deceased, the father of the defendants, (now appellants,) being indebted to him in the sum of £430, executed to him his bond for the payment thereof, with interest thereon; and for securing the payment thereof, on the 7th of October, 1808, executed to the complainant a deed of mortgage of a lot of ground in the town of Lower Marlborough, with a proviso, that if the money was paid on or before the 6th of October then next ensuing the date of said deed of mortgage, then the complainant should * reconvey the said lot of ground to the said

95 David, &c. The bill also stated, that of the mortgage money and interest, £173 1 5, and no more, had, at sundry times, been paid, which payments and the times, &c. are endorsed on the said mortgage exhibited; and that there still remains due and owing to the complainant, a considerable sum of money, with interest. That the said David is dead, leaving the defendants his heirs-at-law. Prayer, that the defendants may be decreed to come to a fair and just account with the complainant for the principal and interest due and owing, &c. and may pay the same by a short day to be appointed by the Court; and in default thereof, that the mortgaged premises may be sold for the payment of what may be so found due to the complainant; or that the defendants may be absolutely barred and foreclosed of and from all manner of benefit or advantage of redemption; and for further relief, &c. The answer of the defendants admitted that Joseph David was in his life-time indebted to the complainant as in the bill is set forth; and that he executed the deed of mortgage as therein is alleged. That in his life-time he made sundry

ence of claims against the deceased, and of the condition of his personal assets. *Gibson vs. McCormick*, 10 G. & J. 65; *Green vs. Early*, 39 Md. 231.

(c) Approved in *Johnson vs. Robertson*, 31 Md. 487. See Rev. Code, Art. 66, s. 65.

payments to the complainant on account of the debt, and which payments they believe are rightly credited and endorsed on the said mortgage, as of the times they were respectively made. Nor do they know or believe that any other or greater payments were made, either by the said David in his life-time, or by any other person since his death. They admit there is a considerable sum of money and arrear of interest due to the complainant as he alleges, for the payment of which they are willing that the mortgaged premises should be sold, upon such terms as to the Court may seem equitable. They admit themselves to be the heirs-at-law of the said David, &c. The County Court, [WILKINSON, A. J.] Decreed, that the property in the proceedings mentioned be sold, and for that purpose appointed a trustee, who was to make sale thereof on a credit of twelve months, &c. The trustee to pay over to the complainant so much as by the auditor of the Court shall be ascertained and reported to be due to him, &c. and the balance, if any, bring into Court, &c. Decreed also, that the auditor of the Court ascertain and report to the Court, with all convenient speed, the amount of principal and interest due to the complainant secured by the * said mortgage. 96

From which decree the defendants appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and DORSEY, JJ.

Magruder, for the appellants, referred to the Act of 1785, ch. 72, s. 3. *Pow. on Mort.* 1039, 1040, 1057, 1058, 1072; *Tyler vs. Bowie*, 4 H. & J. 432.

R. Johnson, for the appellee, cited *Mondey vs. Mondey*, 1 Ves. & Beam. 223; *Mills vs. Dennis*, 3 Johns. Ch. 368; *Knight vs. Knight*, 3 P. Wms. 333, (note ;) *Pell vs. Brown*, 2 Bro. Ch. 279.

BUCHANAN, C. J. delivered the opinion of the Court. Three questions have been raised and submitted to the Court in this case.

1. Whether there should not have been a decree to account, and the amount of the sum due ascertained, before the decree for a sale of the land was passed.

2. Whether the executor or administrator of the father of the appellants, the defendants below, should not have been made a party.

3. Whether instead of an absolute decree for the sale of the land, a day should not have been given in the decree to the appellants for bringing the sum due into Court.

The answer to the first is, that the bill is for the foreclosure of a mortgage to secure the payment of a sum certain, which is * stated in the bill and deed of mortgage, with interest there- 97

on, or a sale of the mortgaged premises for the payment of the amount due; stating that several payments had been made at different times, and showing by endorsements on the back of the mort-

gage deed, which is exhibited, the respective sums paid, and the times when; that the appellants, the defendants below, admit in their answer, the original debt and mortgage, and that the only payments made are those stated in the bill, and endorsed on the deed, and consent to a sale of the mortgaged premises for the payment of the balance of principal and interest due to the complainant. The necessity, therefore, for a decree to account, in order to ascertain the sum due before a sale of the mortgaged premises was decreed, did not exist. It was neither a controverted nor complicated case; the debt is a single debt on bond secured by mortgage, and admitted in the answer, with consent to a sale of the mortgaged premises, for the payment. The principal sum, and every payment made, appear by bill and answer, and nothing but a mere calculation of interest was necessary to show the whole amount due. The decree, moreover, is for a sale on a credit of twelve months, and contains an order to the auditor to ascertain and report the amount of the principal and interest, with all convenient speed; which is substantially all that was necessary to be done before the sale in this case.

As to the second question. If it was a proceeding for the sale of the real estate of a person dying without leaving personal property sufficient for the payment of his debts, it would have been necessary to make the executor or administrator of the deceased debtor a party—the real estate being only answerable in the event of the insufficiency of the personal property to discharge the debts, which is necessary to be shown before a decree can be obtained for the sale of the real estate; and to that end it is proper and required, that he, who has the administration of the personal estate, should be a party; otherwise it would be extremely difficult to come at the fact of insufficiency of the personal assets; and real property might often be subjected to the payment of debts, for which it was not liable. But this is not a case of that character. It is one in which a credi-

98 tor, under no obligation to look to the personal estate of * his debtor, in pursuing and seeking to subject to the payment of his debt, a fund on which he has a specific lien, and with which the executor or administrator has nothing to do, and need not, therefore, be made a party.

To the remaining question, it is a sufficient answer to say, that although ordinarily, under the third section of the Act of 1785, ch. 72, the defendant is entitled to have a day given him to bring in the money, on a decree for the sale of mortgaged premises; yet, being for his benefit, he may waive it if he pleases, which appears to have been done in this case. The answer confesses the complainant's claim, and consents to a sale for the payment of it, on such terms as to the Court should appear equitable; thus untying the hands of the Court, and giving a discretion over the question of time for the payment of the debt, to which the terms of the consent to a sale could alone effectively apply, and not to the terms of sale, over which

the appellants had no control, and could give none to the Court by any consent or act of theirs—all sales in such cases being required by an express provision of the law to be for cash, except where a complainant shall consent to its being on a credit. And although a day for the payment of the sum due on the mortgage is not expressly given in the decree, yet the sale being directed to be on a credit of twelve months, it is equivalent to a day being given to the appellants for the payment of the debt, and is entirely, we think, within the terms of the consent given in the answer to a sale.

Decree affirmed.

ROBERTSON *vs.* MILLS.—June, 1827.

In an action against one partner, by the payee of a partnership note, to recover the amount thereof, the other partner is a competent witness for the defendant, to prove that the consideration of said note was for the witness' exclusive benefit, given to secure a debt due by him on his own account; and that when he signed the note he informed the plaintiff that he was not authorized to sign the defendant's name to it.

APPEAL from Saint Mary's County Court. Action of assumpsit on a promissory note drawn by Rhoads and Mills, in favor of the plaintiff, (now appellant,) on the 24th of May, 1821, for \$171, payable 78 days after date; and also for money had * and received. 99 The action was brought against Rhoads & Mills, but Mills only was arrested. He pleaded *non assumpsit*, on which issue was joined.

At the trial the plaintiff swore Josiah Turner, a competent witness, who deposed that he had received letters and bills from Willard Rhoads, and that he had seen said Rhoads write, and that the signature to the said promissory note, filed in this cause, was in the hand-writing of Rhoads; that he had known the defendant and Rhoads for several years, and in 1820 they had a compting room in Baltimore, and were partners in the mercantile business, and were selling goods together when he last saw them in Baltimore, which was just previous to the date of the said note; that he had heard both Rhoads and the defendant say they were partners in the mercantile business, both before and after the date of the said promissory note. The plaintiff next swore Philip Turner, who stated that at the date of the said promissory note, Rhoads and the defendant had a compting house on Light street wharf, Baltimore, in which there were goods, and that he had seen Rhoads and the defendant, both before and after the date of the execution of said promissory note, in the compting house aforesaid, engaged in purchasing and selling goods. The defendant then offered to swear as a witness the said Willard Rhoads, to prove that the consideration of said prom-

issory note was for the peculiar and exclusive benefit of him Rhoads, and that the said note was given to secure a debt due by him on his own account, (and not from the firm of Rhoads and Mills,) to the plaintiff; and that when he signed the said promissory note he informed the plaintiff that he was not authorized to sign the defendant's name to it. To the admissibility of which last mentioned testimony the plaintiff objected; but the Court, [STEPHEN, C. J. and KEY and PLATER, A. J.] overruled the objection, and permitted the said Rhoads to be sworn, and his testimony aforesaid to go to the jury. The plaintiff excepted; and the verdict and judgment being for the defendant, the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE and MARTIN, JJ.

100 * *Magruder*, for the appellant, contended, that Rhoads was an incompetent witness to prove the facts for which he was offered and admitted to prove. *Owings vs. Low*, 7 H. & J. 124; 2 *Wheat. Selw. N. P.* 870; *Goodacre vs. Breame*, *Peake's N. P.* 174.

C. Dorsey, for the appellee, cited *Ridley vs. Taylor*, 13 *East*, 182; 1 *Phill. Evid.* 54. Judgment affirmed.

BLACK *et al.* vs. CORD.—June, 1827.

Chancery will not interfere, as between the parties, to set aside a fair voluntary conveyance; where the equity being equal, the volunteer having the law shall prevail. But it is now a clearly settled rule, that Chancery will not decree a specific performance of a mere voluntary covenant or agreement without consideration, to make a conveyance. (a)

So where J. executed under his hand and seal an instrument of writing as follows: "This obligation obliges me to give H. or his heirs or assigns, the one moiety or half of 50 acres of land called M.; and also the one moiety or half of a tract called H. B. This instrument of writing to be binding on me, my heirs and assigns, for the true performance of the same;" and there was no evidence of any consideration passing between H. and J.—It was held to be a mere voluntary covenant or agreement, which did not entitle H. to the land itself, nor to a decree for a specific performance, nor to any part of the proceeds of the land which was sold on the application of the creditors of J.

APPEAL from the Court of Chancery.

This cause was argued before BUCHANAN, C. J., EARLE and MARTIN, JJ. and is fully stated by the Chief Judge, who delivered the opinion of the Court.

(a) Cited in *Shepherd vs. Bevin*, 9 Gill, 39, and *Shepherd vs. Shepherd*, 1 Md. Ch. 246.

Magruder, for the appellants contended, 1. That there was no sufficient proof of the execution and delivery of the instrument of writing, whereby John Cord obliged himself to give to Henry Cord, (the appellee,) the one-half of the lands therein mentioned. 2. That if its execution was proved, still the appellee would have no claim to one-half of the proceeds arising from the sale of the lands, as it was not such an instrument of writing as would have enabled the appellee to obtain a deed for the land from John Cord, or his heirs—It not being * stated therein that any valuable consideration passed from the appellee to John Cord to induce the instrument of writing. **101**

The first point was, however, afterwards abandoned, the Act of 1825, ch. 120, having provided that the execution of an instrument of writing may be proved by other evidence than the subscribing witness to it.

On the second point, he cited *Watts vs. Bullas*, 1 P. Wms. 60, (note;) *Minturn vs. Seymour*, 4 Johns. Ch. 500.

Alexander, for the appellee, cited *Hannan vs. Towers*, 3 H. & J. 147; *Watts vs. Bullas*, 1 P. Wms. 60; *Randal vs. Randal*, 2 P. Wms. 464, 467; *Vernon vs. Vernon*, *Ib.* 594; *Osgood vs. Strode*, *Ib.* 248; *Edwards vs. Countess of Warwick*, *Ib.* 175; *Goring vs. Nash*, 3 Atk. 186, 188; *Morris vs. Burroughs*, 1 Atk. 401; *Franklin vs. Thornebury*, 1 Vern. 132; *Bothomly vs. Lord Fairfax*, 1 P. Wms. 334; *Newsham vs. Gray*, 2 Atk. 287; *Harvey vs. Montague*, 1 Vern. 127; *Vernon vs. Vernon*, 4 Bro. P. C. 26; *Bunn vs. Winthrop*, 1 Johns. Ch. 329, 336.

BUCHANAN, C. J. delivered the opinion of the Court. The material facts and circumstances of this case are these—John Cord, on the sixteenth of March, 1815, executed, under his hand and seal, an instrument of writing in these words: “This obligation obliges me to give Henry Cord, or his heirs or assigns, the one moiety or half of fifty acres of land, being part of a tract of land called The Mistake, which my father, James Cord, bought of Nathan Dorsey; and also the one moiety or half of a tract of land called Hickory Bottom, which my father, James Cord, purchased of Robert Davis. This instrument of writing to be binding on me, my heirs and assigns, for the true performance of the same. In witness whereof, I have hereunto set my hand and seal this sixteenth day of March, eighteen hundred and fifteen,” and died without issue, leaving his brother, Henry Cord, and other brothers and sisters, his heirs-at-law. Against whom, his personal estate not being sufficient for the payment of his debts, a bill in Chancery was filed by one of his creditors in behalf of himself and the other creditors, for the sale of the real estate of which he died seized, and a decree was passed accordingly, and the lands sold. Henry * Cord consenting in his answer to a sale, with a reservation of the right to claim such proportion of the proceeds of the sale as he should be able to show himself entitled to **102**

under the instrument of the sixteenth of March, 1815, executed by his brother John Cord. And after a sale was made by the trustee appointed for the purpose, and ratified by the Chancellor, he filed a petition in Chancery, seeking to be paid a proportion of the money arising from the sale, corresponding with the claim set up under that instrument of writing. To this there was a counter petition by the appellants, denying the right of Henry Cord to any part of the proceeds of sale by virtue of that instrument, and praying an equal distribution of the surplus, after payment of the debts among the representatives generally of John Cord.

In the further progress of the case an account was stated by the auditor, allowing to Henry Cord one-half of the money arising from the sale of the sixty acres of land mentioned in the instrument of writing, on which his claim is founded, which account was ratified by an order of the Chancellor, and the trustee directed to apply the proceeds accordingly. And the case is brought before this Court on an appeal from that order. The due execution of the instrument by John Cord is sufficiently proved; and the further proof in the cause is, that Henry Cord had the possession and enjoyment of the whole sixty acres from that time; that it was much improved by his skillful and judicious mode of cultivation, and that John Cord frequently said he had given him one-half of it; but there is no evidence of any consideration moving from Henry. He paid nothing for it, and it does not appear that he put any improvements upon the land. And its improved condition, arising from his skillful cultivation of it, was to his own advantage, having occupied the whole sixty acres, (with no pretence of claim to more than a moiety,) and enjoyed all the fruits of his own good management. It was a mere voluntary covenant or agreement, therefore, on the part of John Cord, and we can discover nothing in the record to entitle Henry Cord to a moiety of the proceeds of sale, which would not have entitled him to a decree for a specific performance of the agreement. If he was not entitled to the land itself, and could not have compelled a conveyance, he is

103 * not entitled to a decree for the proceeds or money arising from the sale of it. Would Chancery, then, have decreed a conveyance of the land on a bill filed by him for that purpose? We think not. Chancery will not interpose, as between the parties, to set aside a fair voluntary conveyance; where the equity being equal, the volunteer having the law, shall prevail. But it is now a clearly settled rule, that Chancery will not decree a specific performance of a mere voluntary covenant or agreement without consideration, (such as this,) to make a conveyance. *Francis' Max.* 14, ch. 15; 1 *Maddock's Chancery*, 414, 415; *Osgood vs. Strode*, 2 *P. Wms.* 249; *Billingham vs. Lowther*, 1 *Ch. Ca.* 243; *Minturn vs. Seymour*, 4 *Johns. Chan. Rep.* 500. And this does not fall within the principle of that class of cases in which a specific performance of marriage articles has been decreed in favor of collaterals, in relation to whom the stipulations

have been deemed to be not purely voluntary, but the consideration considered as extending to, and running through, all the limitations in the articles. The order of the Chancellor, therefore, must be reversed.

Order reversed.

BERRY vs. WARING.—June, 1827.

In an action to recover the value of work and labor performed in the defendant's service, he cannot give in evidence the declarations of the mother of the plaintiff, that she had sent the plaintiff to serve the defendant under an agreement between her and the defendant, that the plaintiff was to serve for his victuals and clothes, although the plaintiff, at the time he went into the defendant's service was a minor, and his mother was his only parent then alive.

The fact that a witness had once seen an entry in a Bible belonging to the plaintiff's father, in his hand-writing, of the birth of the plaintiff, which Bible was not produced, nor its absence accounted for at the trial, does not preclude such witness from stating his recollection of the time of the plaintiff's birth, independently of the entry.

APPEAL from Prince George's County Court. This was an action of assumpsit, brought on the 1st of March, 1823, for work and labor. The defendant, (the appellant,) pleaded *non assumpsit*, and issue was joined.

1. At the trial, the plaintiff, (the appellee,) proved that he came to live with the defendant in June 1820, as an overseer, and continued to reside with him in that capacity for a year. **104** The defendant then offered evidence to prove, that at the time of the plaintiff's so going to live with him, the defendant, he was a minor, living with his mother, since dead, his only surviving parent; and offered to prove that his said mother declared to the witness of the defendant, about one month after the plaintiff had entered as aforesaid into the defendant's service, that she had sent him to serve the defendant, under an agreement between her and the defendant that the plaintiff was to serve the defendant for a year, for his victuals and clothes. But the plaintiff objected to the said declaration of the mother, under said circumstances, being given in evidence, as incompetent. The Court, [STEPHEN, C. J., KEY, and PLATER, A. J.] sustained the objection, and refused to let the evidence of the said declaration go to the jury. The defendant excepted.

2. The plaintiff having proved that he went to live with the defendant in the month of June, 1820, as an overseer, for one year, and rendered services as such during that period, the defendant then proved that the plaintiff was living with his mother, his only surviving parent, at the time when he went as aforesaid to live with the defendant, and that she hath died since he left his employment with

the defendant. The defendant then produced a competent witness, the uncle of the plaintiff, and offered to prove by him, that he did not recollect the day or the year of the plaintiff's birth; that he knew he was born after the year 1800, but did not remember the year; that he remembered that he, the witness, was a stout boy when the plaintiff was born, and that he had such a recollection of the time of his birth as enabled him to say that he was certainly under 21 years of age at the time he left the defendant's service as aforesaid. But when asked, gave no reason for his recollection, other than the facts herein stated. But the Court, as the said witness had stated that he had once seen an entry in the Bible of the plaintiff's father, and in his hand-writing, of the birth of the plaintiff, refused to let the said evidence, so offered, be given to the jury; although the said witness, at the same time, stated that the plaintiff's father was long since dead, and that he had never seen the Bible since the death of the * plaintiff's mother, in whose possession the Bible

105 was when he last saw it, and that he did not know in whose possession it passed when she died; that no person had administered on her estate; that he did not know whether the Bible was now in existence or not, and that he had made no inquiry about the Bible, nor any search for it; and the defendant offered no evidence that he had made any search or inquiry for the Bible. The defendant excepted; and the verdict and judgment being for the plaintiff, the defendant appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE and MARTIN, JJ.

J. Johnson, for the appellant, contended, 1. That the Court below erred in refusing to admit the declarations of the mother of the plaintiff below, to be given to the jury. 2. That the Court below erred in rejecting the evidence of the uncle of the plaintiff.

On the first point, he cited 1 *Phil. Evid.* 187, 188, 195. On the second point, 3 *Bac. Ab. tit. Guardian*, 404; *Freto vs. Brown*, 4 *Mass.* 675.

Mitchell, for the appellee. 1. On the first point, cited 2 *Stark. Evid.* 40; 1 *Phil. Evid.* 180; *Rex vs. Erith*, 8 *East*, 542; *Herbert vs. Tuckal*, *Sir T. Raym.* 84. He insisted that the mother had no interest of any nature or kind in the suit. She was not bound to support her child, although under her roof, and likely to become burthen-some on the parish. That a father was not entitled to the earnings of his child when not under his roof, nor was the mother. *Freto vs. Brown*, 4 *Mass.* 675; *Reeves' Dom. Rel.* 520; *Cooper vs. Martin*, 4 *East*, 76, 82; *Dean vs. Peel*, 5 *East*, 45; 2 *Esp. Evid.* 281; 3 *Stark. Evid.* 1764, (note 1,) 1765.

2. On the second point, he cited 1 *Stark. Evid.* 46, s. 27; 48, s. 29; 3 *Bac. Ab. tit. Infancy and Age*, (D;) 2 *Phill. Evid.* 148, 149.

J. Johnson, in reply, referred to *Daws vs. Howell*, 4 Mass. 97; *Mercer vs. Walmsley*, 5 H. & J. 27.

THE COURT concurred with the Court below in the opinion expressed in the first bill of exceptions; but dissented from the opinion in the second bill of exceptions. *Judgment affirmed.*

* KOONES *vs.* MADDOX.—June, 1827.

106

An action of debt for an escape can be maintained against a sheriff, who having arrested a defendant on a *capias ad satisfaciendum*, permitted him to go at large until the return day of the writ, although the sheriff then brought the defendant into Court. (a)

APPEAL from Saint Mary's County Court. Action of debt for \$219.95, against the appellee, formerly sheriff of that county, for an escape. The declaration stated, that in Saint Mary's County Court, at March Term, 1819, D. Kooner, (the appellant,) and H. Kooner, in the life-time of H. Kooner, recovered judgment against a certain E. Wilder for \$177.02 debt, \$350 damages, and \$6.65 costs. That on the 20th of March, 1820, a writ of *capias ad satisfaciendum* was issued on the said judgment, directed to the defendant, (the appellee,) the then sheriff of the county. That on the 1st of April, 1820, the said execution was delivered to one T. W. Morgan, he then being the lawful deputy of the defendant, &c. That Morgan, being such deputy of the defendant, on the 1st of May, 1820, by virtue of the said writ, arrested and took in execution the said Wilder, and permitted him to go at large and escape, &c. whereby an action accrued to the plaintiff to demand and have, of and from the defendant, the said sum of \$219.95 above demanded, being the debt, damages and costs, and charges aforesaid, &c. The defendant pleaded *nil debet*, and issue was joined.

At the trial the plaintiff proved that judgment was obtained in Saint Mary's County Court by the plaintiff, and H. Kooner his partner, in the life-time of the said H. at March Term, 1819, for \$177.02 debt, with interest, &c. and costs, against a certain Edward Wilder. That the said judgment was kept regularly alive; and on the 20th of March, 1820, a writ of *capias ad satisfaciendum* was issued against Wilder, and delivered to Maddox, the defendant, then being the sheriff of the said county; and that Wilder was arrested by virtue of the said writ on the 1st of May, 1820, by Maddox, sheriff as afore-

(a) The Act of 1828, ch. 50, provided that if the sheriff produced the body of the defendant at the return day of the writ, he should not be liable for any intermediate escape. This Act was probably passed in consequence of the decision in the case in the text. *State vs. Lawson*, 2 Gill, 69.

said, and by him on the same day set at liberty, and permitted to go at large, nobody being with him, Wilder, from that period until the 8th of August in the same year, when Wilder was brought into Court by Maddox, sheriff as aforesaid, and ordered by the **107** * said Court to be discharged from the custody of Maddox, sheriff as aforesaid—he Wilder, having petitioned for the benefit of the insolvent laws of this State. That when the writ of *capias ad satisfaciendum* was delivered to Maddox, sheriff as aforesaid, it was accompanied by written instructions from the plaintiff's attorney, directing, that so soon as Wilder was arrested and taken on the said writ, he should be put into close confinement, and there detained until regularly and legally discharged. The plaintiff then prayed the Court to instruct the jury, that they must find for the plaintiff. But the Court, [KEY and PLATER, A. J.] refused to give such instruction. The plaintiff excepted; and the verdict and judgment being for the defendant, the plaintiff appealed to this Court.

The case was argued at June Term last before BUCHANAN, C. J., STEPHEN, ARCHER, and DORSEY, JJ.

Causin, for the appellant, contended, 1. That a sheriff is liable to an action for a voluntary escape upon process of execution. 2. That he was liable to the full amount of the debt. The action of debt is given against a sheriff for an escape. *Jones vs. Pope*, 1 *Saund.* 38. A sheriff is liable, in an action of debt, for an escape upon process of execution for the whole sum due by the original debtor—debt, interest and costs; in other words, he stands in the place of the original debtor. In support of this position the Court are referred to *Hawkins vs. Plomer*, 2 *W. Blk.* 1048, 1050; *Bonafous vs. Walker*, 2 *T. R.* 132, 133. It is admitted, that in cases of escape upon *mesne* process, if the sheriff have the party in Court at the return day of the writ, his liability is discharged; but it is denied, that in a case of voluntary escape upon final process, as the present is, that any act of the sheriff can purge the escape. *Ravenscroft vs. Eyles*, 2 *Wills.* 295; *Jones vs. Pope*, 1 *Saund.* 35, (*note*;) *Atkinson vs. Matteson*, 2 *T. R.* 172. Thus, according to the British adjudications, it appears that the appellee is liable for the whole debt due by Wilder to the appellant. It remains only to be shown, that the statute which regulated the decisions referred to, has been acted under, and obtains in this State. In order to establish this position, the Court are referred to *Kilty's Report of Statutes*, 221. Statutes made at Westminster, 1 Rich. II, ch. 12; 2 West. 13 Edwd. I, ch. 11; *Pulver vs. McIntyre*, 13 *Johns.* 503; *Kellog vs. Gilbert*, 10 *Johns.* 220; *French vs. O'Neale*, 2 *H. & McH.* 401.

C. Dorsey, for the appellee, referred to the Statute 1 Rich. II, c. 12; *Jones vs. Pope*, 1 *Saund.* 38; *Whittington vs. Polk*, 1 *H. & J.* 250;

Dashiell vs. Attorney-General, 5 H. & J. 403; *Le Caux vs. Eden*, 2 Doug. 525; 5 Jacob's Law Dic. tit. Plantation, 159.

Curia adv. vult.

At this term,

Judgment reversed.

HAMMOND'S EX'RS *vs.* O'HARA.—June, 1827.

To entitle the collector of the County tax to recover in his own right, from a taxable inhabitant, the amount of his assessment, such collector must show that the taxes placed in his hands for collection, had been paid over to the persons in whose favor levies had been made, or adduce some proof, showing that he had furnished such evidence to the proper tribunal for adjusting his accounts. (a)

The circumstance, that an account presented by a collector to the Levy Court, was by that Court, filed in the clerk's office, is no evidence that the Levy Court adopted it. (b)

ERROR to Anne Arundel County Court. This was an action of *assumpsit*. The declaration contained two counts, one for *money paid, laid out and expended, and the other a special count. The defendants below (now plaintiffs in error,) pleaded **112** *non assumpsit*, and issue was joined.

At the trial the plaintiff below (the defendant in error), offered in evidence, that at a Levy Court held in and for Anne Arundel County, on the 10th of March, 1821, a tax of \$1.04 per \$100 was laid on the assessable property in said county, to be collected by the collector of said county, according to law, in the year 1820; that the plaintiff was appointed collector to collect the tax aforesaid, and duly qualified as such; that Philip Hammond, the defendant's testator, had then and there assessable property assessed on the books of said county, to such an amount that the tax thereon, agreeably to the rate aforesaid, amounted to the sum of \$260.13; that the plaintiff in the month of March, 1822, made a full settlement in the usual form with the Levy Court of Anne Arundel County, of the taxes levied upon the said county as aforesaid, in the year 1821; the account of which settlement, filed by said Levy Court in the clerk's office of said county, read in evidence, is in the words and figures following:

(a) See *Ott vs. Chapline*, 3 H. & McH. 196, and *Prather vs. Johnson*, 3 H. & J. 367.

(b) Cited in *Keedy vs. Newcomer*, 1 Md. 250.

"Dr. The Levy Court of A. A. County in acct. with William
O'Hara, Coll'r for 1820.

1822. March.

To amount of levies
for 1820, as per list
rendered,.....\$23,785 34
To 6 per cent. com-
mission on \$25,233 56, 1,514 71

\$25,300 05

1821. March.

By amount of taxes
placed in my hands
for collection, as per
list rendered,.....\$25,233 56
By balance due the
Court for 1819, see ac-
count for that year, 41 31
By balance due me
for 1820,..... 25 18

\$25,300 05"

The defendant then prayed the opinion of the Court, and their in-
struction to the jury, that the plaintiff was not entitled to recover.
Which opinion and instruction, the Court [DORSEY, C. J., KILGOUR
and WILKINSON, A. J.] refused to give. The defendants excepted;
and the verdict and judgment being against them, they brought the
present writ of error.

113 * The cause was argued before BUCHANAN, C. J., EARLE,
STEPHEN and ARCHER, JJ. by *Brewer, Jr.* and *Speed*, for the
plaintiffs in error; and *Alexander* and *Wells*, for the defendants in
error.

ARCHER J. delivered the opinion of the Court. There is no evi-
dence in the bill of exceptions taken in this cause, which would jus-
tify a recovery against the defendants below.

In order to entitle himself to a recovery, the plaintiff should have
shown either that the taxes placed in his hands for collection had
been paid over to the persons in whose favor levies had been made
by the Levy Court, or some proof should have been adduced to show
that the collector had furnished such evidence to the proper tribunal
for adjusting his accounts.

It is said, it is true, that he settled with the Levy Court in the
usual form; and if the bill of exceptions had stopped here, the
plaintiff's case would have been made out; but it proceeds to adduce
what it calls the account of the settlement filed by the Levy Court in
the clerk's office, which is nothing more than an account adduced by
the collector himself against the county, in which his accounts are
balanced. Whether the Levy Court adopted this account, as stated
by the collector, no where appears, or that they have in manner
sanctioned it by any endorsement ordered to be made on the ac-
count, or by any entry directed by them to be made in their proceed-
ings. Their filing it in the clerk's office is no evidence that they
had adopted it. This might, and probably would have been done in

the absence of any adjustment, had the account been delivered to them, in order that it might be safely preserved for future arrangement.

Entertaining this view of the evidence, we deem it unnecessary to express any opinion on the various legal questions which have been presented in the argument of this case; and disagreeing in the opinion expressed by the County Court, direct a reversal of their judgment.

Judgment reversed.

* STEWART *vs.* THE STATE, use of RIGGIN *et ux.*—June, 1828. 114

On a case stated, the sole duty of the Court is to declare the law on those facts only which the statement contains, and its power is restricted within the same limits, as when called on to give judgment on a special verdict. (a)

So where the question was, whether a bill of sale of property, executed by a father to his infant child, which purported on its face to have been given for a valuable consideration, was adopted by him as a convenient form of conveyance, to make a settlement on his daughter; and the case stated, did not describe it as wholly gratuitous, though there was evidence, from which a jury might have inferred that such was the design of the father—The Court held that they could not contradict the facts of which the bill of sale was testimony, and refused to consider the property, thus conveyed to the child, as an advancement. (b)

Inadequacy of consideration alone, untinctured by fraud or circumvention, is not a sufficient ground to vacate a contract otherwise regular. (c)

The well settled rule of law, that parol evidence cannot be offered to explain, contradict or add to the terms of a written contract, does not preclude a representative of the grantor from going into extrinsic evidence to show the true character and design of a conveyance of personal property, where no effort is made to impeach or defeat the title of the grantee, or to alter or impair his rights under it; but only an inquiry into the title of the parties to other property, in which such conveyance is incidentally used as evidence. If the door to such an examination were occluded, the provisions of the Act of 1798, ch. 101, respecting advancements, would become a dead letter in most cases, where written instruments are used to give validity to the settlement intended. (d)

(a) Cited in *Keller vs. State*, 12 Md. 327, where the Court said, that agreed statements of facts have almost entirely taken the place of special verdicts, as being more convenient, yet serving the same purposes and governed by the same principles. See *Mahoney vs. Ashton*, 4 H. & McH. 140, *note*; *Reese vs. Fischer*, *post*, m. p. 320.

(b) Examined and distinguished in *State vs. Jameson*, 3 G. & J. 448.

(c) Cited in *Taylor vs. Turvey*, 38 Md. 505.

(d) Approved in *Parks vs. Parks*, 19 Md. 331, 332, and *Clark vs. Willson*, 27 Md. 702. Cited in *Shepherd vs. Bevin*, 9 Gill, 37, 39. As to advancements, see also *Stewart vs. Pattison*, 8 Gill, 46; *Pole vs. Simmons*, 45 Md. 246; *Harley vs. Harley*, 57 Md. 340; *Manning vs. Thruston*, 59 Md. 218.

APPEAL from Somerset County Court. Action of debt on the administration bond entered into by the defendant (the now appellant) as administrator of John C. Stewart, deceased, on the 13th of October, 1822. The following case was stated for the judgment of the County Court thereon. It is admitted that John C. Stewart died in 1822; that the defendant was appointed his administrator, and gave bond for the faithful performance of his trust. That John C. Stewart, in his life-time was possessed of the following negro slaves, to wit: Esther, Eleanor, Ann, Ephraim, Elizabeth, Leah and Sarah, who came to him by his first wife; and also a bed and furniture, and one desk. That the said John C. Stewart had by his said wife an only child, to wit, Rebecca, the wife of Henry Riffin, for whose use and the use of the said Rebecca, this action was brought. That on the 7th of February, 1816, the said Rebecca being between eight and nine years of age, the said John C. Stewart executed to her a bill of sale of the above mentioned * negro slaves, bed and furniture
115 and desk, then in his possession, for and in consideration of the sum of \$100. Which bill of sale was acknowledged on the day of its date by the said John C. Stewart before a justice of the peace of the county in which he resided, and on the same day enrolled among the records of that county. That shortly afterwards the said John C. Stewart intermarried with a second wife, by whom he had two children. That at his death he left a widow, the two children last mentioned, and the said Rebecca, his representatives. That after the payment of the debts of the said John C. Stewart, and the expenses of administration, there is in the hands of the defendant, his administrator, a balance of \$2,000, to be distributed according to law. That the property in the said bill of sale contained, is of much greater value than what would be the said Rebecca's distributive share of her father's estate. If on the above statement of facts, the Court shall be of opinion, that the said bill of sale transferring the property therein mentioned to the said Rebecca, was an advancement to her, judgment is to be entered for the defendant; otherwise judgment to be entered for the plaintiff for the penalty of the bond and costs, to be released on payment of, &c. A judgment *pro forma* was entered by the County Court for the plaintiff on the statement of facts. From which judgment the defendant appealed to this Court.

The cause was argued before EARLE, STEPHEN, ARCHER, and DORSEY, JJ.

J. Bayly, for the appellant. The balance in the hands of the defendant, the administrator of John C. Stewart, of \$2,000, to be administered according to law, excludes the negro slaves included in the bill of sale from Stewart to his daughter Rebecca. This action, instituted at the instance of Riffin, who had married Rebecca, is for the recovery of a distributive share of the personal

estate due to Rebecca, claiming both the negro slaves, and a distributive share. The defendant refused to pay such distributive share, unless the negro slaves transferred by the intestate to Rebecca be reckoned in the surplus of the estate, which was superior to her share. The question for the decision of the Court was, whether the transfer of the negro * slaves by the intestate to his said daughter Rebecca, and not included in the personal estate, **116** should be considered an advancement by settlement or portion made by the intestate in his life-time to his daughter Rebecca, and be reckoned in the surplus; and if equal or superior, that she should be excluded therefrom? He referred to the Act of 1798, ch. 101, sub-ch. 11, s. 6.

R. N. Martin, for the appellee. The bill of sale in question appears to be a conveyance of certain personal property for a valuable consideration; and has upon its face all the features of an ordinary sale of goods and chattels. It is not an advancement within the meaning of the Act of 1798, ch. 101. 1. To constitute an advancement, it is essential that the property should appear to have been transferred as a voluntary settlement upon the child, or as a gift for a good consideration; and not for a valuable consideration, as is here expressed. 2. It was not competent for the defendant in the Court below to introduce parol evidence for the purpose of impeaching the consideration thus stated in the bill of sale; or to show that the true character and intent of the instrument, were different from what they purported to be. 3. Admitting that it was competent to introduce the extrinsic evidence, mentioned in the case stated, for the purpose of proving that there was in fact no moneyed consideration existing between the parties, and that the real design of the father was to make a gift or settlement upon his child; still it was not within the province of the Court to pronounce upon the sufficiency of that evidence to establish facts so inconsistent with the assertions of the deed itself; but the question of sufficiency should have been submitted to a jury.

On the first point he cited 1 *Swinb.* 233; 1 *Mad. Ch.* 628; 2 *Rob. on Wills*, 105, 108; *Edwards vs. Freeman*, 1 *P. Wms.* 436.—On the second point—3 *Stark. Ev.* 1004; *Clarkson vs. Hanway*, 2 *P. Wms.* 203, 204; *Schemerhorn vs. Vanderheyden*, 1 *Johns.* 139; *Maigley vs. Hauer*, 7 *Ib.* 342; *Howard vs. Rogers*, 4 *H. & J.* 278; *Hurn vs. Soper*, 6 *H. & J.* 276; *Peacock vs. Monk*, 1 *Ves.* 128; *Mildmaye's Case*, 1 *Co.* 176; *Filmer vs. Gott*, 7 *Bro. P. C.* 70; *Rex vs. Inhabitants*, 3 *T. R.* 474.

* *DORSEY, J.* delivered the opinion of the Court. The Court being called on to revise a judgment given by the County **118** Court on a case stated, their sole duty is to declare the law on those facts only which the statement contains. Inferences of law they are competent to draw; but circumscribed as this case is, it is not

their province to make deductions of fact. Their powers are restricted within the same limits, which would be prescribed to them, if they were called on to give judgment on a special verdict.

The bill of sale, upon its face, bears all the solemnities necessary to make it that which it purports to be—a sale of goods and chattels for a valuable consideration. The other admissions in the cause, are evidence which might have been submitted to a jury, to enable them to find the facts—that the consideration in the bill of sale was merely nominal—was never paid, or intended so to be—that the real design of the father was wholly gratuitous, and that he adopted this as a convenient form of conveyance, to make a gift or settlement on his daughter. In doing this they must find facts inconsistent with, and contradictory of, the facts of which the bill of sale is testimony. The exercise of such authority is the peculiar privi-

119 lege of the jury; * but the Court in a case like the present, cannot be called on to exert such a power. The facts to be inferred are not self-evident, irresistible conclusions, arising from the circumstances of the transaction. Inadequacy of consideration alone, untinctured by fraud or circumvention, is not a sufficient ground to vacate a contract otherwise regular. Much less is it conclusive, that no such contract was ever made as that specified in the instrument. But there is no positive proof of any such inadequacy. Although it is admitted, that in 1825 the property conveyed was worth more than \$2,000, it does not hence necessarily follow, that it was so in 1816, when the conveyance was executed. Nor is the number of negroes irrefragable proof of that fact. They may have been at that time, in such a state of extreme infancy, and laboring under such infirmities, as to have been of no greater value than that specified as their price. Neither does the infancy of the daughter, (as has been insisted on for the appellant,) demonstrate that the consideration money was never paid. She might have had money, independently of her father, in the hands of a trustee authorized to invest it for her benefit; or some relation or friend may have been willing to advance or give her that sum of money to enable her to make an advantageous bargain.

We mean not to say, that a jury would not have been warranted in finding, from the facts admitted, all other facts necessary to establish the defence of the defendant below. All we intended to decide is, that this Court cannot infer those facts; and that without them, the conveyance in question cannot be regarded as an advancement within the meaning of the Act of Assembly.

The well settled rule of law, that parol evidence cannot be offered to explain, contradict or add to, the terms of a written contract, which, it was contended, precluded the appellant from going into extrinsic evidence to show the true character and design of the bill of sale, we do not think applicable to the question before us. No effort is here made to impeach or defeat the title transferred by this

conveyance, or to alter or impair the rights of the *cestui que use* under it, as far as relates to the property which it professes to convey; but the inquiry is into the title of the parties to other property, in which this bill of sale is incidentally used as evidence, and comes, as it were, collaterally * in question. If the door to such an examination were occluded, the provisions of the **120** Act of 1798, respecting advancements, would become a dead letter in most cases where written instruments are used to give validity to the settlement intended; as it most rarely occurs, that some money consideration is not expressed in the deed. If such a barrier to the discovery of truth, and the administration of justice, were to be sanctioned, it would be contrary to the whole scope and design of those just, important, and salutary principles of our government, which provide for an equal distribution of an intestate's estate amongst all his representatives—it would, in effect, repeal one of the wisest, and most wholesome provisions of our testamentary system.

Judgment affirmed.

BRODESS vs. THOMPSON.—June, 1828.

The Orphans' Courts derive their powers mostly from statutory provisions, and are tribunals confessedly limited in their jurisdiction—unable to exercise any authority whatever not expressly given by law. (a)

The interest or income of a minor's estate is the fund out of which he is to be maintained and educated, and under no circumstances could be exceeded, until the Act of 1785, ch. 80, was passed; by the 9th section of that law, the Orphans' Court may allow the guardian to apply a part of the personal estate, not exceeding a tenth, to the education of his ward; and the Act of 1798, ch. 101, sub-ch. 12, s. 10, only enlarged that authority, by extending the expenditure to any part, or the whole of the personal estate.

Should an application of the personal estate not suffice to maintain and educate a ward, suitably to his future destination, then such maintenance and education may also induce an application of a part of the real estate, with the approbation of the Court of Chancery, as well as the Orphans' Court.

It is the province of the guardian under our laws to take care of the person of his ward; and it peculiarly belongs to his office, to keep together and preserve his property of every kind and description. Repairs necessary for those ends, within the compass of the ward's income, ought to be attended to, but schemes of improvement under no circumstances ought to be engaged in; and the Orphans' Court have no authority to sanction them, by an application of any part of the minor's estate. (b)

(a) Approved in *Townshend vs. Brooke*, 9 Gill, 90; *Conner vs. Ogle*, 4 Md. Ch. 452; *Lowe vs. Lowe*, 6 Md. 352. See *Grant vs. Clary*, 59 Md. 445, to the same effect. As to the exercise of constructive powers by the Orphans' Courts, see *Raborg vs. Hammond*, ante, m. p. 42.

(b) Cited in *Tyson vs. Latrobe*, 42 Md. 333.

APPEAL from Dorchester County Court. This was an action of
 121 assumpsit. The declaration of the plaintiff, (now * appellee,) contained sundry counts. 1. For divers goods, wares and merchandises, sold and delivered. 2. *Quantum meruit* for the goods, &c. so sold and delivered. 3. For other goods, &c. sold and delivered; and that such goods, &c. were reasonably worth, &c. 4. For money paid, laid out, and expended. 5. For money lent and advanced. 6. For money had and received. 7. On an *insimul computassent*. 8. For meat, drink, washing, &c. furnished the defendant. 9. For meat, drink, &c. furnished to divers other persons at the request of the defendant. The defendant, (the appellant,) pleaded *non assumpsit*, and issue was joined.

At the trial the plaintiff offered in evidence an account between him and the defendant, with an order passed by the Orphans' Court, authorizing the plaintiff to build certain houses on the defendant's estate, and their appointment of viewers, with the return thereof. The account was as follows: "Dr. Edward Brodess in account with Anthony Thompson, his guardian, for the years 1821 and 1822." It commenced in March, 1821, ended in December, 1822, and charged the defendant with sundry articles furnished, cash lent, paid, &c. Lost time for certain negro slaves. Board, washing and lodging, &c. for the defendant, and board and attendance for certain of his negro slaves, and clothing, &c. and for building houses, &c. \$1,300.60. The whole then amounting to \$1,610.08. To which was added the balance due the plaintiff as guardian in his last account, \$686.45, his commission of 10 *p. c.* with other money paid, board, &c. and for cash paid for valuing houses, \$4, and allowance for attendance on the workmen on building the houses, \$20. The amount of the debit of the whole account, \$2,381.80. After deducting credits, the balance due the plaintiff, as guardian, was \$1,869.02. Which account was settled with and passed by the Orphans' Court. The order of the Orphans' Court referred to, passed on the 13th of June, 1820, whereby they "ordered that Anthony Thompson, guardian to Edward Brodess, be allowed to build a house on his ward's land, a single story 32 by 20—two rooms below, with two plank floors and brick chimney; and also a barn of good materials—all under the directions of Gurney C. Pattison." Then follows the * order of the

122 Orphans' Court, and certificate and report of persons appointed by that Court at the instance of Thompson, to view and examine the buildings and improvements made on the farm belonging to Brodess, by Thompson, and also to examine and report on the quality and quantity of the materials, and also to ascertain the value thereof. They certify and report that they had examined, &c. and were of opinion that the buildings and improvements put on the said farm, were done in workmanlike manner, and at fair and reasonable prices; and that the charges made were such as ought to be allowed, &c. The defendant then prayed the Court to instruct the

jury, that the plaintiff was not entitled to recover in this action upon the evidence exhibited by him, and to direct them to find a verdict for the defendant. Which instruction the Court, [MARTIN, C. J., SPENCE and TINGLE, A. J.] refused to give, being of opinion, that the Orphans' Court had authority to permit the guardian to put repairs on the real estate to the amount of the personal property of the ward; and that having passed his accounts for the same, it was *prima facie* evidence of its correctness. But the defendant was not precluded from showing that it was not correct. The Court was also of opinion, that the Orphans' Court had no authority to appoint appraisers or valuers of the repairs as done in this case, and that their proceedings and return were not legal evidence. The Court were also of opinion that the allowance mentioned in the said final account of \$4 to H. Jefferson and J. Byus, for valuing houses, and the allowance of \$20 to the guardian for his attendance on the workmen in building houses, mentioned in the said final account, ought to be stricken out of the said account, and not allowed to the guardian; and so directed the jury. The defendant excepted; and the verdict being for the plaintiff for \$601.20, and judgment thereon rendered, the defendant appealed to this Court.

The cause was argued before EARLE, STEPHEN, ARCHER, and DORSEY, JJ.

R. N. Martin, for the appellant, cited Act of Ass. 1798, ch. 101, sub-ch. 15, s. 20. *Scott vs. Burch*, 6 H. & J. 67.

J. Bayly and *Page*, for the appellee, argued, that the jurisdiction was given by the Act of 1798, ch. 101; and referred to sub-ch. 12, s. 8, of that Act, which recognized the right of the guardian to purchase slaves, stock and utensils, with the ward's money, with the approbation of the Court; also to the 10th section of the same sub-ch. by which the Court, if deemed advantageous to the ward, may allow the guardian to exceed the income of the estate, and to make use of the principal, and to sell part of the same under its order.

EARLE, J. delivered the opinion of the Court. The appellee in this case brought an action of assumpsit in Dorchester County Court, to recover compensation for certain buildings, erected by him on the land of the appellant. He had been under the guardianship of Thompson, and while he was his ward, the buildings were put up, under the order, and with the approbation of the Orphans' Court of that County, and at an * expense greatly exceeding the income of his estate, both real and personal. And was it within the authority of the Orphans' Court to pass such an order? is the question now submitted to this Court. 126

The Orphans' Courts derive their powers mostly from statutory provisions, and are tribunals confessedly limited in their jurisdiction, unable to exercise any authority whatever, not expressly given by

law. The authority of the Orphans' Court of Dorchester County, to issue the order in question, is accordingly sought for in the Act of 1798, ch. 101, and more particularly, in the tenth section of the 12th sub-chapter of that Act. Does it confer the power contended for? is the point immediately before us.

The interest or income of a minor's estate, is the fund out of which he is to be maintained and educated, and under no circumstance could be exceeded, until the Act of 1785, ch. 80, was passed. By the ninth section of that law, the Orphans' Courts are invested with authority, to allow the guardian to apply a part of the personal estate, not exceeding a tenth part thereof, to the education of his ward. The Act of 1798, ch. 101, in its tenth section of the 12th sub-chapter, only enlarged this authority, by extending the expenditure to any part, or the whole of the personal estate, if necessary. The better education of the ward is the object of both laws, and the general expressions used in the tenth section, are to be construed with reference to this object. What shall be deemed advantageous to the ward, is to be understood, in respect to his maintenance and education, having an eye to his future situation, and prospects in life. That the Legislature did not mean to extend the expenditure of the principal, to any other objects than those personal to the ward, is plain from the language of the tenth section, in the closing part of it. "No part of the real estate shall, on account of such maintenance or education, be diminished, without the approbation of the Court of Chancery, or General Court, as well as the Orphans' Court." Clearly indicating, by the relative terms such maintenance or education, the object of expenditure authorized in the first part of the same section. Should an application of the personal estate not suffice to maintain and educate suitably to the future destination of the ward, then such maintenance and education may also * induce an application of a part of the real estate, with

127 the approbation of the Court of Chancery, or General Court, as well as the Orphans' Court.

As it is the unquestionable province of a guardian, under our laws, to take care of the person of his ward, so we think it peculiarly belongs to his office, to keep together and preserve his property of every kind and description. Repairs necessary for these ends, within the compass of the income, ought to be attended to; but we apprehend that schemes of improvement, under no circumstances, ought to be engaged in. They often prove expensive, and their tendency is to encumber the ward, and involve him in debt; and we are decidedly of opinion the Orphans' Court have no authority to sanction them, by an application of any part of the principal of minors' estates.

Judgment reversed.

DASHIELL *et al.* vs. DASHIELL.—June, 1828.

In the judicial interpretation of wills, the intention of the testator is to be gathered from the entire instrument, and prevails, unless it violates some established principle of law. (a)

Executory devises and bequests are valid, where they must take effect, if at all, within a life or lives in being, and twenty-one years and the fraction of a year afterwards.

In the case of a bequest of personal property, the Courts are always studiously anxious to effectuate the intention of the testator, and will lay hold of the smallest circumstance to limit a failure of issue, (where such property is devised upon that contingency,) to the death of the first taker, so as to make the limitation over, good as an executory devise. (b)

Where a testator devised as follows: "I bequeath unto my grand-daughter E. the following negroes, viz." &c. "to her and her heirs forever; and in case it should please God, to take my grand-daughter before she has an issue, then the said negroes devised, to be an equal division between the rest of my heirs. And it is my will, that neither D. nor J. should ever have any command, or authority, over the negroes devised to my grand-daughter." The legatee died without ever having had a child—*Held*, that the limitation over, was a good executory bequest to the heirs of the testator, who were such at the time of his death; and that they were entitled to the property bequeathed to them, as tenants in common.

An action of *detinue* may be maintained in this State.

APPEAL from Dorchester County Court. This was an action of detinue, brought by the present appellants, (the * plaintiffs in that Court,) against the appellee, (the defendant therein,) to 128 recover sundry negro slaves. The following statement of facts was agreed to by the parties, and submitted to the Court below for their judgment thereon, viz. That the negro slaves in the declaration mentioned, were the property of, and belonged to John Dashiell, Senior, in his life-time, and at the time of his death. That the said John Dashiell on the 19th of February, 1817, duly made and executed his last will and testament, in which, among other devises and bequests therein contained, is the following: "I give and bequeath unto my grand-daughter Elizabeth Sarah Ann, the following negroes, viz. Bill, young Leah, Sally, Nancy, Levin, Stephen, Noah, to her and her heirs forever; and one bed and furniture; and in case it should please God to take my grand-daughter Elizabeth Sarah Ann, before she has an issue, then the said negroes devised, to be an equal division between the rest of my heirs. And it is my will and desire, that neither Ichabod Dashiell, nor Thomas Jones, of Thomas, should ever

(a) Approved in *Robinson vs. Robinson*, 4 Md. Ch. 186. See *Bowly vs. Lamot*, 3 H. & J. 4; *Drury vs. Grace*, 2 H. & J. 305; *Berry vs. Berry*, 1 H. & J. 255, to the same effect.

(b) See *Newton vs. Griffith*, 1 H. & G. 78, note (b); Rev. Code, Art. 49, s. 9.

have command or authority over the negroes devised to my granddaughter Elizabeth Sarah Ann." That the testator, soon after making the said will, died, leaving it in full force and operation, having thereby bequeathed the said negroes slaves to his granddaughter Elizabeth Sarah Ann Dashiell, as by reference to the said will may more fully appear. That in pursuance of the said bequest, the said negro slaves were delivered over by the executor, named in the will of the testator, to the said Elizabeth Sarah Ann. That the said Elizabeth Sarah Ann never was married, nor had any child, or children, but died sometime in the year 1823, intestate, leaving Priscilla Dashiell, her mother, and several brothers' and sisters of the half blood by the second marriage of her mother, the defendant, with the said Ichabod Dashiell, mentioned in the said will. That the said Ichabod Dashiell died a few days before the death of the said Elizabeth Sarah Ann. That Thomas Jones, of Thomas, mentioned in the said will, married the sister of the defendant. That the plaintiffs in this action are the heirs of the said John Dashiell, the testator, and mentioned by him in his said will as the persons to whom the negro slaves were bequeathed and limited in case the

129 said Elizabeth Sarah Ann should die before she had an * issue. That the said negro slaves have been and still are in the possession of the said Priscilla, the defendant, since the death of the said Elizabeth Sarah Ann, and of the said Ichabod; and the said Priscilla claims the said negro slaves on behalf of herself, and children, by the second marriage, as the legal representatives of the said Elizabeth Sarah Ann; and the plaintiffs claim the said negro slaves under the limitation in the said will. If the Court, upon the matter stated, and from the above facts as stated, should be of opinion that the law is with the plaintiffs, and that they are entitled to recover in this action, then judgment is to be entered for the plaintiffs for the negro slaves mentioned in the declaration, or their respective values as therein stated, and \$94.50, damages for the detention, and costs. But if the Court should be of opinion that the law is with the defendant, and that the plaintiffs are not entitled to recover, then judgment to be entered for the defendant, with costs. The County Court rendered judgment on the case stated, for the defendant; and the plaintiffs appealed to this Court.

The cause was argued before EARLE, STEPHEN, ARCHER, and DORSEY, JJ.

J. Bayly, for the appellants.

Kerr and *R. N. Martin*, for the appellee, contended, that the executory bequest in dispute, gave to the devisee an absolute interest in the slaves; the limitation over resting upon an indefinite failure of issue, and being therefore too remote. They insisted on the force and legal import of the general expressions employed, and that there were no words or circumstances in the will indicating an intention

in the testator to limit the generality of the expressions to a failure of issue at the time of the death of the first devisee. *Butler's Fearne*, 440, 460, 485; *Davidge vs. Chany*, 4 H. & McH. 393; *Bramluck vs. Dorman*, 2 Atk. 308; *Hope vs. Taylor*, 1 Burr. 268; *Brigg vs. Bensly*, 1 Bro. 188; *Everett vs. Gill*, 1 Ves. Jr. 286; *Chandler vs. Price*, 3 Ves. 99; *Barlow vs. Salter*, 17 Ves. 477; *Elton vs. Eason*, 19 Ves. 73.

STEPHEN, J. delivered the opinion of the Court. This case comes up on an appeal from a judgment rendered in Dorchester * County Court, on a statement of facts agreed upon by the 130 counsel, containing, among other things, the following clause in the last will and testament of John Dashiell; "I give and bequeath unto my grand-daughter, Elizabeth Sarah Ann, the following negroes, to wit, Bill, young Leah, Sally, Nancy, Levin, Stephen, Noah, to her and her heirs forever; and one bed and furniture; and in case it should please God to take my grand-daughter, Elizabeth Sarah Ann, before she has an issue, then the said negroes devised, to be an equal division between the rest of my heirs. And it is my will and desire, that neither Ichabod Dashiell, nor Thomas Jones, of Thomas, should ever have any command or authority over the negroes devised to my grand-daughter, Elizabeth Sarah Ann." And this Court is now called upon to determine the true construction of the above recited clause, and to decide whether the limitation over, after the bequest to Elizabeth Sarah Ann, the first legatee, is valid and operative as an executory bequest, according to the established principles of law. The position is undeniable, that in the judicial interpretation of wills, the intention of the testator, to be gathered from the entire instrument, shall prevail, unless it violates some established principles of law. And the single question presented for our adjudication is, whether Elizabeth Sarah Ann, upon the true construction of the will of her grand-father, became entitled to the absolute property in the negroes bequeathed to her; or whether the limitation over to the heirs of John Dashiell, the testator, was good, as a valid executory bequest? Upon the rule then, that the mind of the testator, as expressed in his last will and testament, shall be carried into effect, unless it infringes some well settled legal principle, it is the duty of this Court to ascertain what the intention of the testator was, and to execute that intention if warranted by law in so doing. The bequest is to Elizabeth Sarah Ann, to her and her heirs forever. So far it gives her, most unquestionably, the absolute interest in the subject of the bequest; but it proceeds, and states, "and in case it should please God to take my grand-daughter Elizabeth Sarah Ann, before she has an issue, then the negroes devised, to be an equal division between the rest of my heirs." The limitation over is only to take effect, in the event of the first legatee dying before she had an * issue. If then, according to the express words of the will, the executory bequest was only to take effect upon the hap- 131

pening of a contingency, which if it happens at all, must happen within a life in being, it may be asked, upon what principle of law such a bequest can be invalidated? Can there be a doubt that so soon as Elizabeth Sarah Ann had a child, (for such is the obvious meaning of the terms used,) the limitation over as an executory disposition of the property, was absolutely gone forever; and that if the contingent interest, bequeathed to the heirs, could ever become vested, it could only be upon the happening of the event of her dying without ever having had a child during her life-time. If this is a correct construction of the words of the will, there is nothing in the principles or policy of the law, in relation to this branch of the science, which would inhibit the Court from carrying into effect the limitation over as a valid testamentary disposition of that portion of his estate; the rule of law being, that all executory devises and bequests are good, where they must take effect, if at all, within a life or lives in being, and twenty-one years and the fraction of a year afterwards. We do not think that the counsel for the appellee were successful in the position which they endeavored to maintain, that this was nothing more than simply a case of dying without issue, and, therefore, an indefinite failure of issue, and consequently too remote a contingency, for the limitation over to be good; because, as has been already remarked, the failure of issue, if it occurred at all, must have occurred at the time of the death of the first taker, and not afterwards; because the legatees over were only to take, if they took at all, upon the first legatee dying, (in the language of the will,) "before she had an issue." Which certainly cannot mean a dying after she had issue, so that it might have been possible for the testator to have meant an indefinite failure of issue. On the contrary, it is conceived, that the meaning of the testator, defining and limiting the failure of issue to occur in a life or lives in being, could not have been couched in language more strongly expressive and unequivocal. It is also worthy of recollection, that this is the case of a bequest of personal property, where the Court are always studiously anxious to effectuate the intention of the testator, and will lay hold of the smallest circum-

132 stance * to limit the failure of issue to the death of the first taker, so as to make the limitation over good as an executory bequest. Wherever it is manifestly the intention of the testator, as we think it was his intention in this instance, to limit personal property over, upon a failure of issue at the death of the first taker, that intention must be carried into effect. The case of *Elton vs. Eason*, 19 Ves. 73, which was relied upon by the counsel for the appellee, does not appear in any degree to militate against the construction given to the words of this will. That was a devise to trustees of real and personal property, upon trust, to apply the rents and profits, for the son of the testatrix, during his life, and afterwards for the heirs of his body, if any; and in default of such issue, then upon a further trust. The Master of the Rolls determined, that the words,

if any, could not vary the construction, because, if not expressed, they would necessarily have been implied; because, to use his own language—"To be sure if there were no heirs of his body, none could take." In the case of *Crooke vs. De Vandes*, 9 Ves. 197, referred to in this case of the Master of the Rolls, the limitation was to one, and to the heirs of his body lawfully issuing; and if he has no such heirs, then over. The Lord Chancellor held, that the leasehold property vested absolutely in the first taker. The Lord Chancellor must have considered the superadded words, "and if he has no such heirs," as meaning only, that upon the failure of such heirs as had been mentioned, the limitation over was to take effect; but the language of that case is very different from that of the case before this Court, which is, that if the first taker dies before she has an issue, (or child as we suppose the meaning to be,) then the limitation is to take effect.

This Court are, therefore, of opinion, in this case, that the limitation over was a good executory bequest to the heirs of the testator, who were such at the time of his death; and that they hold the property bequeathed to them, as tenants in common.

The judgment of the Court below must be reversed, and judgment entered upon the case stated for the appellants, the plaintiffs in the Court below.

Judgment reversed, &c.

* OSGOOD vs. SPENCER'S Ex'r.—June, 1828.

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On a joint promissory note, after the death of one of the drawers, the remedy at law exists alone against the surviving drawers, and is extinguished against the representatives of the deceased drawer. The only remedy which the payee or endorsee has against such representative, is in equity.

Matter in bar which shows the irresponsibility of the defendant at the commencement of the suit, may be given in evidence under the general issue without being reduced to the form of a special plea. (a)

So in an action against the executor of one of several makers of a joint promissory note, to recover the amount thereof, where the other co-drawers were alive at the commencement of the suit, it is not necessary for the defendant to plead their survivorship in abatement, but it may be given in evidence under the general issue.

APPEAL from Kent County Court. This was an action of assumpsit on a promissory note, brought in the name of the surviving payee, (the now appellant,) against the executor of one of the drawers, (the appellee.) The defendant pleaded *non assumpsit testatoris*, and issued was joined.

(a) As to what defences must be specially pleaded in *assumpsit*, see *Dunlop vs. Funk*, 3 H. & McH. 192, note.

At the trial the plaintiff offered in evidence the following note :
 “\$666.66. BALTIMORE, 4th May, 1819.

Ninety days after date, we promise to pay H. & R. H. Osgood six hundred and sixty-six dollars and sixty-six cents, without defalcation.

J. CAMPBELL,

W. GILBERT,

Witness, *Jno. Somerville.*

WILLIAM SPENCER.”

The due execution of which note was admitted by the defendant. On an objection made to the reading of the said note, the Court determined the note was competent testimony, as the due execution was admitted. It was also admitted by the defendant, that Henry Osgood, one of the payees in the note, was dead before the institution of this suit. It was admitted by the plaintiff that John Campbell and William Gilbert, the other persons named with William Spencer as drawers, are both in full life. The defendant moved the Court to instruct the jury, that if they believed the said Campbell and Gilbert to be still alive, this action could not be sustained against the defendant, as executor of William Spencer, deceased; but that
134 the only * remedy at law was by suit against the surviving drawers. The Court, [EARLE, C. J., PURNELL and WRIGHT, A. J.] gave the jury the instruction as prayed by the defendant. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before STEPHEN, ARCHER, and DORSEY, JJ.

Chambers, for the appellant, contended, 1. That a plea in abatement, stating the facts, was the only mode in which the defence could be made by the defendant in the Court below. Or, 2. That at all events it should have been pleaded in bar, and could not be given in evidence on the general issue. *Brown vs. Warham*, 3 H. & J. 572; *Pike vs. Dashiell*, 7 H. & J. 466; The Act of 1811, ch. 161; *Anthon's Dig.* 2; *Eccleston vs. Clipsham*, 1 Saund. 154, (note 1;) 1 Bac. Ab. tit. Abatement, (N.) 25.

Spencer and Carmichael, for the appellee, cited 1 Bac. Ab. tit. Abatement, (N.) 25; *Owen vs. Butler*, 1 Ld. Raym. 345; 1 Chitty's Plead. 334, 37, (note u,) 434; *Evans vs. Stevens*, 4 T. R. 227; 5 Bac. Ab. 163; *Cabell vs. Vaughan*, 1 Saund. 291, (note.)

ARCHER, J. delivered the opinion of the Court. The question presented by the bill of exceptions is, whether the defendant was bound to plead in abatement, that his testator was a co-drawer of the promissory note declared on, with others who are living, and that the right of action had survived against the survivors, and was extinguished as to him; or whether it might be given in evidence under the general issue?

No case has been cited which is in terms decisive of the present question. But an examination of some admitted principles of law cannot fail to lead to a correct conclusion.

It is undeniable, and has been conceded in argument, that on joint contract, such as this, the remedy at law exists alone against the surviving drawers, and that it is extinguished against the representatives of the deceased drawer, and that the only remedy which the payee or endorsee has against such representative is in equity.

* The death of the defendant's testator, and the survivorship of his co-drawers, was then a complete and full answer **135** to any action in a Court of law against him, and would forever operate in such tribunal as a bar. If put upon the record as a plea, it is not to be considered, as are pleas in abatement, merely dilatory, but as one reaching the merits of the plaintiff's claim against the defendant, and as finally conclusive of it.

This being the character of the defence, it is properly matter in bar, and not in abatement; which latter in general pre-supposes a right to proceed against the defendant in some other form, as in conjunction with others not sued, or at some other time, as in the case of an alien enemy; but this defence denies the defendant's liability altogether, at any time, or in any shape, in a Court of law. It being matter in bar which shows the irresponsibility of the defendant at the commencement of the suit, it may be given in evidence under the general issue, without being reduced to the form of a special plea.

Most defences may be given in evidence under the general issue in assumpsit, except limitations, insolvency, set-off and tender, or alien enemy where the disability of the plaintiff accrued by war after the contract was made. We are inclined to think there will be found few other exceptions. If a general release, before suit brought, need not be pleaded, it would be difficult to assign a sensible reason why this defence, which is as operative and conclusive at law as would be a release, should be plead? The effect in discharging the defendant is in each case precisely the same. In the one the release is the act of the party, in the other the act of the law.

Judgment affirmed.

DORSEY vs. SMITH.—June, 1828.

An appeal from the order of the Chancellor dissolving an injunction will not lie. It is an abuse of the right of appeal, and will be censured accordingly. (a)

(a) Approved in *Marshall vs. Baltimore*, 8 G. & J. 217. But see Rev. Code, Art. 71, s. 41.

136 APPEAL from the Court of Chancery from an order of the Chancellor, dissolving an injunction obtained by the appellant * against the appellee, enjoining him from proceeding on a judgment at law.

Motion on the part of the appellee to dismiss the appeal; and it was ruled by the Court that the appellant show cause, &c. on or before, &c. Before which day the appellant, in person, dismissed his appeal.

R. Johnson, for the appellee, (not knowing that the appellant had dismissed his appeal,) called the attention of the Court to the motion, heretofore made in this case, to dismiss the appeal—the rule on the appellant to show cause, &c. having been served, &c. He stated that it was an appeal from an order of the Chancellor, dissolving an injunction, which had been before then issued to stay the appellee from proceeding against the appellant upon a judgment at law.

THE COURT. It appearing that the appellant has himself dismissed the appeal, the motion is necessarily disposed of; but as it may be advantageous to have the opinion of the Court known as to the legality of appeals from orders of this kind, the Court take this occasion to declare that they are unanimously of opinion that such appeals will not lie, and that they will consider them an abuse of the right to appeal, and will censure them accordingly.

Appeal dismissed.

MORTON *vs.* BEALL'S Adm'r.—June, 1828.

The surety in a replevin bond is not a competent witness for the plaintiff, in the action of replevin. (a)

If it is discovered during any part of a trial, that a witness is interested, his evidence shall be struck out.

Where the interest of a witness is discovered after his examination, it is the duty of the Court to direct the jury to discard his evidence, although both parties may have informed the Court, that the testimony was closed, and the witnesses had been discharged—the party making the objection having omitted to disclose it at an earlier period, with no intention of ensnaring his adversary.

APPEAL from Saint Mary's County Court. Action of replevin for certain negro slaves, brought in the life-time of the appellee's intestate, against the appellant. The death of the * then plaintiff **137** was suggested, and the appellee, as his administrator, was made plaintiff. The sureties in the replevin bond entered into by the plaintiff before the issuing the writ of replevin, were George G.

(a) Approved in *Owens vs. Collinson*, 3 G. & J. 35. But see Rev. Code, Art. 70, s. 1.

Ashcom and John C. Ashcom. The defendant pleaded property in himself, to which issue was joined.

At the trial the plaintiff produced and swore John C. Ashcom, who gave important testimony to the jury on the issue joined. Other witnesses were then examined by the plaintiff and defendant, when the hour for adjourning the Court arrived. When the Court were about to adjourn, they gave notice to the counsel on both sides, that they would permit no other testimony to be examined in the case the next day; if they had any other they must then examine it; and the counsel answered they had none. The Court then adjourned. At the meeting of the Court the next morning, the case was taken up for trial, when the defendant, by his counsel, prayed the Court to instruct the jury, that they would discard from their consideration, in making up their verdict in this case, the testimony of the said John C. Ashcom, it having been discovered, since the said witness was examined, that he was a surety in the replevin bond given in this case by the plaintiff, and, therefore, incompetent. Which fact was admitted. The counsel for the plaintiff objected to the instruction to the jury as prayed for. And the Court told the counsel for the defendant, that if he would state that he had not yesterday known the fact, that the witness was surety in the replevin bond, that then they would now discard his testimony, otherwise they would not. The counsel answered that they had discovered it when they were taking up the papers at the time of the adjournment of the Court on yesterday. The Court [STEPHEN, C. J. and PLATER, A. J.] then refused to give the said instruction, alleging that the application was too late; and instructed the jury to consider the testimony of the said John C. Ashcom as competent—the witnesses all having been discharged the preceding day. The defendant excepted; and the verdict and judgment being for the plaintiff, the defendant appealed to this Court.

* The cause was argued before BUCHANAN, C. J., EARLE, ARCHER, and DORSEY, JJ. **138**

Stonestreet, for the appellant, cited *Allegre vs. The Maryland Insurance Company*, 6 H. & J. 413, 415.

C. Dorsey, for the appellee, referred to *Curren vs. Connery*, 5 *Binney's Rep.* 488.

EARLE, J. delivered the opinion of the Court. We are of opinion that the judgment in this case ought to be reversed, and a *procedo* awarded.

The Court clearly erred in refusing to direct the jury to discard the testimony of John C. Ashcom, who was manifestly an incompetent witness in the cause. The rule now is, if it is discovered, during any part of the trial, that a witness is interested, his evidence shall be struck out. The reason assigned for not striking out

the evidence of John C. Ashcom, appears to us to be an insufficient one. No witness in the cause gave the important testimony delivered by John C. Ashcom, and it is presumable none of the witnesses were in possession of the facts narrated by him. If then new witnesses were to be sought for to supply his place, it could have been as well done the second day of the trial, as on the first, and the plaintiff's predicament was in no way changed by the adjournment. Neither does there appear anything like a disposition in the defendant, to ensnare his adversary, by disregarding the promise made by him, to produce no new testimony at the adjourned meeting of the Court. He offered no new evidence the next day, and only objected to testimony laid before the jury by the plaintiff, on a ground which came to his knowledge, when the jury were for the day discharged.

Judgment reversed, and procedendo ordered.

139 * THE STATE, use of BLACKISTONE *vs.* BLACKISTONE.
June, 1828.

In an action on a testamentary bond, a plea that since the last continuance of the cause, the Orphans' Court of the county, which granted the letters testamentary, had revoked them, is no bar to the plaintiff's right of recovery.

Where letters testamentary or of administration have been revoked pending the suit, the delinquent executor or administrator, is deprived of no honest defence which should be made to the action.

If no assets have come to his hands—if he has administered them—if preferred creditors will consume the whole estate—if he has satisfied the claim, or on any ground it be unfounded in law or fact, it may be pleaded in bar of the action.

If there be other debts outstanding, or paid, or if the property of the deceased has, under the order of the Orphans' Court, been delivered over to a new administrator, it may be pleaded, not as a complete bar to any recovery, but it will confine the plaintiff to nominal damages, or such other damages as a Court and jury, under all the circumstances of the case, shall think him entitled to recover; but if no new administrator has been appointed, judgment should be rendered as if the letters testamentary had not been revoked.

APPEAL from Saint Mary's County Court. This was an action of debt, brought on the testamentary bond entered into on the estate of Kenelm Blackistone, by his executor Dent Blackistone, the defendant, (now appellee,) on the 8th of February, 1821. The defendant pleaded general performance. To which the plaintiff replied, that Kenelm Blackistone departed this life, leaving his wife Juliet, and seven children, having before his death made his will, dated the 12th of January, 1821, whereby he devised a part of his property to his wife in lieu of dower, and bequeathed the rest to his seven children,

viz. Nathaniel, Charles C., Stephen, Ferdinand, Edwin, Gustavus and Madrid, to be equally divided amongst them; one of which said children is Charles C. Blackistone, at whose instance and for whose use this suit was instituted. That the defendant was appointed executor by the said will, to whom letters testamentary were granted, and gave bond, &c. That he returned an inventory of the said estate, amounting to \$1,077.36. That the said executor under the said will, sold St. Catharine's Island for \$3,000, which by the said will was to be divided amongst the said seven children of the testator. That N. Blackistone, one of the children, agreeably to the will of his father, elected to take lot No. 1, 50 acres, at \$12 per acre, for which he gave * his bond to the executor, and which said sum of money was to be divided among the said seven **140** children; and that the executor had received money belonging to the said estate to the amount of \$2,000, which also was to be distributed. That the executor had made payments and disbursements to the amount of —, which deducted left a balance due to Charles C. Blackistone, (at whose instance and for whose use this action was brought,) of \$800, which the plaintiff averred the executor had not paid, &c. The defendant rejoined, "that after the last continuance of this cause, and before, &c. to which day this cause was last continued, and before this day, to wit, on the 1st of July last at, &c. the Orphans' Court in and for the said county revoked the letters testamentary heretofore granted to him on the estate of Kenelm Blackistone." To this rejoinder the plaintiff demurred generally; and the defendant joined in demurrer. The County Court overruled the demurrer, and gave judgment for the defendant; from which judgment the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., ARCHER and DORSEY, JJ.

Ashton, for the appellant.

C. Dorsey, for the appellee, referred to the Act of 1798, ch. 101, sub-ch. 6, s. 13, and contended, that the revocation of the letters testamentary by the Orphans' Court discharged the defendant from all obligations growing out of his testamentary bond, except to his successor; and was therefore a legal ground for him to plead that fact *puis darrein continuance*.

* DORSEY, J. delivered the opinion of the Court. The only question which we are called on to consider is, were the Court **142** below right, under the circumstances presented by the record in this case, in determining that the plea of *puis darrein continuance*, simply stating that the letters testamentary had been revoked, was a bar to the plaintiff's right of recovery?

The letters testamentary were granted in February, 1821, the present action was commenced in February, 1824, and the revoca-

tion of the letters took place some time between the months of March and August, 1827—upon what grounds, does not appear. The plea does not set forth the appointment of an administrator *de bonis non*, much less, that agreeably to the Acts of Assembly in such case provided, all the unadministered estate of the deceased has, under the order of the Orphans' Court, been delivered over to such substituted administrator. Under such circumstances, we think the Court erred in overruling the demurrer to the defendant's plea. At the time of the institution of the suit, the equitable plaintiff had a good cause of action, the bond of the defendant had become forfeited by his failure to distribute the unadministered effects of the deceased, as required by law. Should he then, by refusing to settle his accounts with the Orphans' Court, or to give additional security when called on for that purpose, (thus adding default to default,) be permitted, after involving the equitable plaintiff in litigation for three years, to turn him out of Court, burthened, not only with his own costs, but with the costs of the defendant also? No principle of law enjoins it; reason and justice forbid it. If the doctrine were sanctioned, it would be in the power of executors or administrators, dishonestly disposed, to withhold the effects of the deceased from the payment of his debts, suffer themselves to be sued by the creditors; and after exhausting all the delay and indulgence which the law extends to them, by their own delinquency to cause a revocation of the letters testamentary or of administration, and thus dismiss the creditors from Court, mulcted not only with all their costs, rightfully incurred in the prosecution of their just claims, but with the costs too of the defendant, the defaulter. And they must then wait until a new administrator be appointed, and the estate of the deceased recovered, by suits on the old testamentary

143 or * administration bond, or otherwise; when perhaps, this new administrator, encouraged by the successful devices and rewarded delinquencies of his predecessor, may be tempted to tread in his footsteps, to the ruin of the creditors and distributees. For such an anomaly in the law, such an outrage upon justice, as would be produced by the recognition of the doctrine contended for, no satisfactory reason can be assigned. By establishing a contrary doctrine, no injustice, no inconvenience or hardship, of which he has a right to complain, will be done to the delinquent executor or administrator. He is deprived of no honest defence which should be made to the action. If no assets have come to his hands—if he has administered them—if preferred creditors will consume the whole estate—if he has satisfied the claim, or on any ground it be unfounded in law or fact, it may be pleaded in bar of the action. If there be other debts outstanding or paid, or if the property of the deceased has, under the order of the Orphans' Court, been delivered over to a new administrator, it may be pleaded, not as a complete bar to any recovery, but it will confine the plaintiff to

nominal damages, or such other damages as a Court and jury, under all the circumstances of the case, shall think him entitled to recover. But if, as in the present case, no new administrator has been appointed, judgment should be rendered as if the letters testamentary had not been revoked.

ARCHER, J. dissented.

Judgment reversed, and procedendo awarded.

WEEMS *et al.* vs. MILLARD.—June, 1828.

Upon a general demurrer to a declaration, the only question to be determined by the Court, is whether the facts contained in it, (the truth of which are confessed by the demurrer,) show such a case as can be enforced in a Court of law. (a)

How far the allegations in the declaration can be sustained by proof, or what is the legal effect of the contract signed by the defendant, (a copy of which was exhibited in a part of the record not under consideration,) are inquiries which do not arise under such a state of pleadings.

APPEAL from St. Mary's County Court. The plaintiffs in the Court below (now appellants,) brought an action of * *assumpsit* 144 against the defendant, (the appellee.) The declaration (having been twice amended) contained two counts. The first count stated, that the plaintiffs, being proprietors and owners of the Steamboat Surprise, heretofore, to wit, on, &c. at, &c. caused the said steamboat to be advertised and put up for sale in shares, in manner and form following; that is to say—"We the subscribers, promise and oblige ourselves, our heirs and executors, to pay, or cause to be paid, unto George Weems and Company, the sum we may subscribe, as a payment for the Steamboat Surprise, in three equal instalments, in manner and form following, to wit: One-third on or before the tenth day of March next; one-third on or before the tenth day of May; and the balance on or before the tenth day of June next. It is hereby understood that we, George Weems and Company, bind ourselves to appropriate the money subscribed in no other manner, than for the payment and use of the said boat; and that each subscriber will hold an interest in proportion to the shares they may take, and will be entitled to draw their proportion of dividends once in every six months after the starting of the said boat. We George Weems and Company, bind ourselves to run the said boat from Baltimore to Patuxent River, and as far as Nottingham, and to use every possible exertion in our power to the interest of the said boat. The

(a) Cited in *Turnpike Road vs. State*, 19 Md. 289, where the Court said, that to the proposition that a general demurrer to a plea confesses all the facts in the plea, must be added the qualification that they be well pleaded.

shares will be divided into two hundred and eighty shares, at one hundred dollars each." (a.) That on such exposure to sale as aforesaid, to wit, on, &c. at, &c. the defendant became the purchaser of, and with his own hand subscribed the said proposals of sale, of and for one share in the said steamboat, upon and according to the said conditions; and thereupon afterwards, to wit, on, &c. at, &c. in consideration that the plaintiffs, at the special instance and request of the defendant, had then and there undertaken, and faithfully promised the defendant, to perform and fulfil all things in the said conditions contained on their part to be performed, the defendant then and there undertook and promised to the plaintiffs, to perform everything in the said conditions on his part to be performed. That although the plaintiffs have been ready and willing, &c. of which

145 the * defendant had notice, &c. and was requested by the plaintiffs to pay them the said \$100; yet the defendant, &c. The second count stated, that the plaintiffs before and at the time of making the contract and undertaking thereafter mentioned, to wit, on, &c. at, &c. being the proprietors of a certain steamboat called the Surprise, before that time purchased by them, and for which they had not then paid. And whereas the plaintiffs had agreed to divide the interest in the said boat, and the ownership thereof, into shares, to be taken and subscribed for by those who were willing to take and subscribe for the same, and to retain the shares remaining unsubscribed for, to and for their own use, and to be the holders of such stock or shares, which should remain unsubscribed for, and not taken; of all which the defendant then and there had notice. And whereas the plaintiffs, in pursuance of such agreement, on, &c. at, &c. issued the following terms and proposals, to be signed by such persons as would sign the same, to wit: "We the subscribers promise," &c. [as stated in the first count.] That the plaintiffs, at the special instance and request of the defendant, did, on, &c. at, &c. suffer and permit the defendant to become the purchaser of, and a subscriber with his own proper hand, for one of said shares in the said boat, upon the terms and conditions as aforesaid; and thereupon afterwards, to wit, on, &c. at, &c. in consideration that the plaintiffs, at the special instance and request of the defendant, had then and there undertaken and faithfully promised to the defendant, to perform and fulfil all the things in the said condition on their part to be performed, he the defendant then and there undertook and promised to the plaintiffs to perform everything in the said condition on his part to be performed. That although the plaintiffs have the day and year aforesaid been ready and willing to perform everything in the said agreement contained on their part and behalf, to be performed and fulfilled, of which the defendant afterwards on, &c. at, &c. had notice, and was then and there requested by the plaintiffs to pay them the said sum of one hundred

(a) This agreement was filed on issuing the writ, and forms a part of the record.

dollars; yet the defendant his promises and assumptions so as aforesaid made, not regarding, &c. To this declaration there was a general demurrer, and joinder in demurrer; and the County Court sustained the demurrer, and rendered *judgment for the defendant. From which judgment the plaintiffs appealed to this Court. **146**

The cause was argued before BUCHANAN, C. J., ARCHER and DORSEY, JJ.

C. Dorsey, for the appellants, contended, that the action could be sustained, in opposition to the opinion of the Court below, deciding that the contract was void for uncertainty. The grounds upon which the action was decided as not sustainable, was that the plaintiffs and defendant were partners in the steamboat; and that the contract was inartificially drawn. Where a sum of money is to be paid by one partner to another by a contract, an action will lie for its recovery. 3 Bac. Ab. 709; 1 Chitty's Plead. 26; Venning vs. Leckie, 13 East, 7; Van Ness vs. Forrest, 8 Cranch, 30; Duncan vs. Lyon, 3 Johns. Ch. 351.

Stonestreet and Magruder, for the appellee. The contract is uncertain, and incapable of being executed. No steps were to be taken under it until the whole fund was raised to effect the purchase of the steamboat. The contract does not say of whom the boat was to be purchased, nor by whom, nor what sum of money should be necessary for the purchase. The contract was never consummated, and no partnership was ever formed. The contract, as exhibited in the record, was not signed by the plaintiffs so as to bind them. The whole number of shares was not subscribed, and there was to be no payment made on any share unless the whole fund was raised, nor was the boat to be purchased until then. To carry the contract into effect the whole sum necessary for the purchase of the boat should be subscribed, and the contract signed by the plaintiffs.

C. Dorsey, in reply. The declaration avers that the plaintiffs were the owners of the steamboat, &c. The general demurrer admits all the averments in the declaration to be true. A contract need not be signed by the party who seeks to enforce it. Rob. on Frauds, 124.

DORSEY, J. delivered the opinion of the Court. This case has been argued by the counsel for the appellee, as if we were *called on to review an opinion of the Court below upon the **147** sufficiency of the testimony offered on the trial, to entitle the plaintiffs to recover. But this is not the duty which we have now to discharge. The only question to be determined is, whether the facts contained in the declaration, as amended (the truth of which is confessed by the demurrer,) show such a contract as can be enforced in a Court of law? That they do, we entertain no doubt. But how far the allegations in the declaration can be sustained by proof, or

what is the legal effect and operation of the subscription list signed by the defendant (a copy of which is exhibited in a part of the record, not now under consideration,) are inquiries which do not arise in the present state of the pleadings.

Judgment reversed, and procedendo awarded.

STODDERT'S Lessee *vs.* MANNING.—June, 1828.

It is the modern practice in location causes to offer in evidence all the plots and explanations returned under the warrant of resurvey, which is an excellent course, well calculated to lay the whole subject before the Court and jury.

A letter of a deceased surveyor, with his plot and explanations, of the lands in dispute, made up chiefly of his statements and opinions, which did not give his declarations of former runnings of the lands, which he performed as surveyor, or to which he was in any way a witness, nor describe with sufficient precision to be understood, the place and extent of the lines of the tracts therein referred to, and in the survey of which he acted as an assistant, are not competent evidence to go to the jury.

Where the record of a commission to take depositions, &c. was not produced, nor did it appear by what authority, nor under what law it was issued, nor in what manner, or under what notice it was executed, copies of depositions obtained from the Court of Chancery, which purported to have been taken in obedience to a commission issued by that Court in the year 1713, for the swearing and examining of evidences relating to the boundaries of a tract of land, called by the same name with that for which an action of ejectment was brought, are not competent evidence: although the register of that Court informed the lessor of the plaintiff that the report of the commissioners containing the depositions aforesaid, was the only paper relating thereto that he could find in his office, upon diligent search. (a)

A witness cannot excuse himself from giving testimony, on the ground that he is called to swear against his interest. (b)

In an action of ejectment where defence is taken on warrant and plots are returned, an objection to the competency of a witness on the score of
148 * interest, cannot prevail, where the interest of the witness is not located on the plots; and his own private plot, made to demonstrate his interest, cannot be received in evidence for that purpose.

A witness who declined to give evidence of a particular boundary, although in the execution of the warrant of resurvey, he was at the place where it stood, and was called upon by the plaintiff to testify in relation to it, may yet at the trial be called on to testify thereto, though not sworn on the survey.

A witness who was not on the resurvey, and did not show to the surveyor a certain division line, is not competent to give evidence, in reference to such line, to the jury. (c)

(a) See *Weems vs. Disney*, 4 H. & McH. 105, note (b).

(b) See *Taney vs. Kemp*, 4 H. & J. 282, note.

(c) Cited in *Morrison vs. Hammond*, 27 Md. 619. Under Rev. Code, Art. 64, s. 25, witnesses may be examined, in an action of ejectment, who were

APPEAL from Charles County Court. This was an action of ejectment for the recovery of two tracts of land called Rotterdam and William and James. The defendant, (the appellee,) took defence on warrant, and plots were returned.

1. At the trial the plaintiff, (the appellant,) produced William Wheeler Lewis, who gave in evidence, that about thirty-five years ago there were some peach trees at the place marked on the plot •. The plaintiff then produced the following letter, plot and explanations, which he proved to be in the hand-writing of Theophilus Hanson, who is now dead, to wit: "Thursday, June the 1st, 1797. D. Sir, I received yours, left at my house yesterday, requesting my advice and opinion respecting the first and second lines of the tract of land called William and James, on which your land in the neck in some degree depends. As to my advice and opinion, I think of little consequence. I shall, therefore, lay all the circumstances before you on which my opinion is founded. The William and James is a resurvey on a tract of land called Rotterdam, about the year 1728. The certificate says, (after running a number of courses,) to an ancient bounded white oak standing on an ivy point by Nanjemoy Creek side, opposite to the dwelling house of Mr. William Stone, at which place, (according to the depositions of Nicholas Cooper and Robert Taylor, formerly taken,) stood the second bound tree of Rotterdam, from thence running into the woods east according to the original line of Rotterdam, for the length of 500 perches, then S. W. by W. 270 perches, to a locust post now put up in the line of the said tract called Nanjemoy or Indian Town, then, &c. About thirty years ago Mr. Hutchison, and Mr. Stoddert run this * land, or part of it, in order to make a division, (as you will see by the enclosed paper,) but 149 for some reason, and probably because, (what you call the first line of William and James did not take in their possessions,) did not complete the division. In the year 1764, Wheton Wallace made a resurvey, and took up the land left out by the then running the east line of William and James as far as the head of Goose Creek, or nearly as far. This appears to have been done a very little after the survey made by Hutchison and Stoddert. Some time after this survey, Mr. Henry Brent took up the balance of the land left out by the first line of William and James. About 10 or 12 years ago, Mr. Hutchison called on me to survey William and James, at which time the appearances were as represented in the enclosed paper. There were then three or four witnesses; Charles Timms was one, the rest I do not remember; they all agreed in the same representation; they had all lived long in the neck, and appeared to be well acquainted with the circumstances. I made the survey for Wheton Wallace, as assistant under my father, and well remember running the first line

not sworn on the survey, and a witness may be shown to be interested without locating his interest on the plats.

of William and James a considerable distance into the possessions and cultivations of the tenants on the William and James. From these circumstances it is my opinion, that the east line of the William and James, from the second boundary of Rotterdam, ought to be run so as to include the possessions as shown, and that it would be so supposed, provided that no transactions of the proprietors of the William and James would operate against them. There is no possession that will operate in this case I believe; and although the correction, agreeably to the age of the William and James, would not include the former possessions; yet as it's my opinion, according to the original line of Rotterdam, it would be corrected agreeably to the age of Rotterdam, so as to include the former possessions, and that the second line would run from the end of the first line as aforesaid to a free stone, a boundary of St. Thomas' Manor, which is also a boundary of William and James. And if the transactions of the proprietors of the William and James should prevent them from their claim on the first line, I do not think it would prevent yours on the second. I would advise you to get more able opinions than mine before * you do any thing on the land which might
150 involve you in a suit, in which you might possibly suffer. I am dr. sir, with sincere respect and esteem yours, &c.

THEO. HANSON.

N. B. Nanjemoy, or Indian Town, is a tract of land (I believe,) resurveyed with Rotterdam into William and James."

[Then follows the plot, with the explanations thereof.]

The plaintiff then prayed the opinion of the Court, and their direction to the jury, that the same was competent testimony of the facts therein stated. But the Court, [KEY, and PLATER, A. J.] refused to admit the said letter, and plot and explanations, in evidence to the jury. The plaintiff excepted.

2. The plaintiff then produced Thomas Burgess, who was sworn in chief, and then refused to give testimony, and prayed the protection of the Court, alleging that he was interested, and produced to the Court a plot made for his private use, to show his interest; the Court then called on James Brawner, who swore that the beginning of Bye Fields Close, was the same as the boundary at B, on the plots and explanations filed in this cause. But the said plot, produced by the witness of Bye Fields Close, was not located on the plots filed in this cause; which said tract called Bye Fields Close is the land of the witness, Thomas Burgess. Whereupon the Court was of opinion, that the said Thomas Burgess was interested, and incompetent to give evidence to the place B, marked on the plots filed in this cause. The plaintiff excepted.

3. The plaintiff then offered Thomas Burgess, who had been offered as a witness on the survey at a place marked on the plot B, who was sworn in chief, but objected to giving testimony, alleging that he was interested in the location. The witness then produced

a plot made out by the surveyor for his private use, and the surveyor gave testimony that the beginning of Bye Fields Close was at the same place as the second boundary of Rotterdam marked B, as on the plots filed in this cause, which said plot, thus given to the Court by the witness, and which plot and lines were not located on the plots filed in this cause, is as follows: [Here follows the said plot.]

* The witness then produced a patent for Bye Fields Close, granted to Jeremiah Dickeson, on the 26th of May, 1663, lying on the east side of Avon River, in Charles County, adjoining to land formerly surveyed for Simon Oversee, called Rotterdam, &c. and gave in evidence that a part of the land included in the line of Rotterdam, as located on the plots filed in this cause by the plaintiff, was in possession of the witness. The plaintiff then asked the said Thomas Burgess to state what he knew of the tree marked letter B on the plots filed; and whether it was or was not the second boundary of Rotterdam; and further asked him to point out the beginning of Bye Fields Close. And then prayed the Court to instruct the witness to answer the question, first as to the place marked B; and secondly, as to the beginning of Bye Fields Close. The witness replying that he was interested, and therefore objected. Which prayer the Court refused *in toto*, and were of opinion that the witness was interested and incompetent. The plaintiff excepted. **151**

4. The defendant then produced Giles G. Craycroft, a competent witness, who gave in evidence that a certain Samuel Chandler, in the year 1807, who is since dead, told the witness, that sometime before, the proprietors of the plaintiff's land, and the proprietors of Wallace's land, had agreed upon a division line, and that he Samuel Chandler had been present at a survey made by said parties, and that they run the line, and blazed the trees marked on the plot i to k, and that the fence marked on the plot was put on the line; that the said parties agreed to meet again, and enter into writings or bonds, yet did not meet. To which testimony the plaintiff objected; but the Court overruled the objection, and suffered the evidence to go to the jury. The plaintiff excepted.

5. The plaintiff then read in evidence the patent of the tract of land called Rotterdam, granted to Simon Oversee, on the 11th of March, 1658, "lying on the north side of Potomack River, and on the eastern branch of a creek in the said river formerly called Nanjemoy Creek, but now Avon River. Beginning," &c. The certificate of said land is admitted to bear date the 7th of July, 1651. The plaintiff then read to the jury * the patent of Rotterdam, granted to Robert Doyne, dated the 9th of June, 1676, reciting "whereas it appeareth by a certain inquisition indented, bearing date the thirteenth day of December, in the fortieth year of the dominion of Cæcelius, late absolute Lord and Proprietary of the Provinces of Maryland and Avalon, Lord Baron of Baltimore, taken **152**

by Henry Adams and Thomas Mathews, Gentl. by virtue of a writ of mandamus, issued out of our Court of Chancery, it was found that Symon Oversee of Charles County, in our said Province of Maryland, deceased, at the time of his decease, was seized in his demesne as of fee, and died possessed of five hundred and fifty acres of land called Rotterdam, lying on the east side of the easternmost branch of Nanjemoy Creek; and by the same inquisition it appeareth that the said Symon Oversee died intestate, and without heir; whereupon it was the judgment of our Justices of our Provincial Court, the eighth day of this instant, month of June, that the said 550 acres of land late in the tenure of the said Symon Oversee, is escheated unto us for want of heir. Now know ye, that we, for and in consideration of twenty thousand pounds of tobacco, to us secured to be paid by Robert Doyne, of Charles County aforesaid, gentl. we do hereby grant unto him the said Robert Doyne all that parcel of land called Rotterdam, lying on the north side of Potomack River, and on the eastern branch of a creek in the said river formerly called Nanjemoy Creek but now Avon River, beginning," &c. The plaintiff further read in evidence the patent of a tract of land called William and James, granted to William Hutchinson and John Stoddert on the 27th of May, 1736, in virtue of a special warrant to resurvey two tracts or parcels of land, the one called Nanjemoy Indian-Town, and the other called Rotterdam—five-sixth parts whereof were granted to the said Hutchinson, and one-sixth part to the said Stoddert, &c. The plaintiff then offered in evidence the following affidavit of John T. Stoddert, the lessor of the plaintiff, viz. "John T. Stoddert makes oath, that in the month of September, in the year 1819, he called upon Thomas H. Bowie, Esquire, then register in Chancery, to make search in his office for a commission issued out of the High Court of Chancery, directed to a certain Anthony Neale and William

153 Chandler, bearing date the 15th * of March, 1713, for the swearing and examining evidences relating to the bounds of a tract of land lying in Charles County, called Rotterdam, belonging to the orphans of William Hutchison, and for the report of said commissioners. Such search was made by the said register as this deponent believes; and a copy of the report of the commissioners containing two depositions, to wit, one of Nicholas Cooper, and another of one Robert Taylor, to the second boundary of Rotterdam, was furnished; and the deponent was informed by the said register, that it was the only paper relating to this business that he could find in his office upon diligent search." Sworn to the 28th of March, 1822. The plaintiff then offered to read in evidence the following paper, being copies of the depositions referred to in the above affidavit, and obtained from the Court of Chancery, to wit: "Maryland, *scilicet*. In obedience to a commission out of the High Court of Chancery directed to us, Antho. Neale and Wm. Chandler, the subscribers hereof, bearing date the fifth day of March, Anno 1713, for the

swearing and examining evidences relating to the bounds of a tract of land lying in Charles County, called Rotterdam, belonging to the orphans of William Hutchison, we have taken these following depositions, hereunder transcribed, being from such persons as was offered unto us by Mr. James Stoddert, guardian to the orphans, viz. Nicholas Cooper, aged seventy years or thereabout, being by us duly sworn upon the Holy Evangely, and examined, saith," &c. [The matters sworn to related to the boundaries and lines of the tracts of land in controversy, but the County Court having refused to permit the depositions to be read to the jury, and the Appellate Court having sustained that opinion upon grounds distinct from facts contained in them, they are omitted.] "Certified under our hands and seals this thirteenth day of January, Anno 1714. A true copy of the original sent to ye Chancery by us.

ANTHO. NEALE,

WILL. CHANDLER."

The plaintiff then prayed the Court to admit the said affidavit to be read, and to admit the said depositions in evidence. Which the Court refused. The plaintiff excepted.

* 6. The plaintiff then, in proof of his locations of Rotter-
dam and William and James, read in evidence the patent of **154**
a tract of land called Rotterdam, granted to Simon Oversee; also
the patent of a tract of land called Rotterdam, granted to Robert
Doyne; and also the patent of a tract of land called William and
James, granted to William Hutchison and John Stoddert—all of
which said patents are hereinbefore more particularly referred to.
The plaintiff then gave in evidence by a certain Giles G. Craycroft,
that he lived on the plaintiff, (Stoddert's) land, in the year 1807, or
8, and that he asked S. Chandler if he know how the fencing, located
on the plot from red C to a little red c was to be kept up, and that
then they were near the said fence, and who informed him that the
fence was put there by agreement between Hutchison, and Stoddert
and Wallace, who are the same persons who held Rotterdam and
the William and James, and that from the head of the marsh the
line run to a box oak, standing on a point of the bank near which
there are ivys and near the new discovered spring; and that he
went this morning with the surveyor, and pointed out the tree which
he supposes to be the tree alluded to by the said Chandler, and that
there is no other box oak standing on the said point, or near it. The
plaintiff further gave evidence, that the said Chandler is dead; and
also gave in evidence by the surveyor, that the tree shown by the
witness, Craycroft, is the tree marked on the plot by letter B.
The witness further stated, that Saml. Chandler said that he had
understood from old people that the tree formerly stood under the
bank, and was a white oak, but that he, Chandler, never knew any
other boundary but the box oak, and that he had frequently seen it run
from, and not from any other; and he further told the witness, that
it was a boundary of the Indian-Town Land, which name was the

common name of the lands held by Hutchison and Stoddert. And further gave in evidence by Bennet B. Semmes, that he has known the lands held by Hutchison and Stoddert for 38 years, and that the lands went by the common name of the Indian-Town Tract. This witness did not know any thing about Rotterdam, except what he has seen and heard upon the location made in this cause. The plaintiff further gave in evidence by William W. Lewis, that at the place * marked on the plot by black B, there stands, a box oak,
155 the same that stood there thirty-five years ago; that it has not grown much; that it stands on a point near a spring called The New Discovery Spring, about 20 steps from the creek, and is surrounded along the bank with ivys, and that there is no other point like it any where near it. The plaintiff further gave in evidence by James Brawner, a competent witness, that at the place marked on the plot by black B, there has stood from the time he first knew it, and still stands, a box oak upon an ivy point near Nanjemoy Creek; that there were three trees there standing when he first knew it, one a red oak, one a hickory, and the other the said box oak; that there is no other point on the creek near this place answering this description. And further gave in evidence, that the tree is marked with blaze, which appears to have been done from 15 to 20 years ago, and that the said tree is a flourishing, thriving tree. The defendant then prayed the Court to instruct the jury, that the plaintiff was not entitled to recover. Which opinion and direction the Court refused to give. The defendant excepted. The verdict of the jury, and judgment thereon by the Court, was for the defendant, and the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., EABLE, ARCHER, and DORSEY, JJ.

156 *Magruder*, for the appellant, * referred to *Snavelly vs. M^r Pher-son*, 5 H. & J. 154; *Peake's Evid.* 192; *The City Bank of Baltimore vs. Batement*, 7 H. & J. 104.

No counsel argued for the appellee.

EABLE, J. delivered the opinion of the Court. The appeal is taken in this case in an action of ejectment, instituted in Charles County Court, for the recovery of two tracts of land, called Rotterdam and William and James. The defendant took defence on warrant, and plots and explanations were returned in the cause. In the progress of the trial, five bills of exceptions were signed by the Court, at the instance of the appellant, which it has now become our duty to revise and decide upon.

It is the modern practice, in location causes, to offer in evidence all the plots and explanations returned under the warrant of resurvey. This we commend as an excellent course, well calculated to lay the whole subject litigated, explicitly before the Court and jury. It

has not been pursued in the case under consideration; but the plots and explanations are, nevertheless, adverted to in the proceedings, and are sufficiently before us, to claim our attention in disposing of the points we have to act upon.

We concur with the Court below, in their opinions delivered in the first and last (the fifth) bills of exceptions; but we must beg leave to dissent from those expressed by them, in the remaining bills of exceptions. In the first bill of exceptions the Court were right in rejecting the letter, plot and explanations, of the deceased surveyor, Theophilus Hanson, and in not permitting * them to be laid before the jury. They contain no legally correct information, **157** and are made up mostly of statements and opinions. Unlike the case of *Snarely vs. M'Pherson & Brien*, 5 H. & J. 150, they do not give his declarations of former runnings, which he performed as a surveyor, or to which he was in any way a witness. He speaks, it is true, of a survey made between the years 1760 and 1776, when he acted as an assistant to his father, in locating a vacancy taken up by Wheton Wallace, yet he does not designate it on his plot with sufficient precision to be understood, or to ascertain the place where the line of William and James, sometimes called its first line, formerly run. He well remembers that it run a considerable distance into the possessions and cultivations of the tenants on the William and James; but the exact distance it run is undetermined, and the possessions and cultivations are not delineated on his plot. The old Peach Orchard he has mentioned, is not located by the plaintiff on the plots in this cause, and we cannot readily perceive how it would be possible to give it an exact designation, on any particular part of them, from the very uncertain information derived from Theophilus Hanson.

It is to be collected from the depositions offered in evidence in the fifth bill of exceptions, that they were taken under a commission issued from the High Court of Chancery in the year 1713. But the record of the commission is not produced, neither does it appear by what authority, or under what law, it was issued; nor in what manner, or on what notice it was executed. If authorized, it seems to have been altogether an incomplete and imperfect proceeding, and the Court could not have erred, we think, in refusing it admission to the jury.

In the second and third bills of exceptions, the Court refused to the plaintiff the benefit of Thomas Burgess' testimony, on the score of incompetency, on account of his supposed interest in the event of the suit. In this we clearly think their Honors were wrong. The objection to testify was made by the witness himself, but if it had come from a different quarter, it could not have been available. If Thomas Burgess had an interest, it is not located on the plots in the cause, and his own private plot made to demonstrate it, could not be received * for that purpose. He was moreover called to swear against his interest, and it is not for a witness to excuse him. **158**

self from giving evidence on this ground. Since the case of *Taney vs. Kemp*, decided in this Court in the year 1818, 4 H. & J. 348, it may be laid down as a rule of evidence, that no person shall be exempted from giving testimony on the ground that his answer may affect his interest. What the particular situation of Thomas Burgess is, in respect to the lines of Rotterdam, or William and James, does not fully appear. But whether the establishment of the boundary at B, deprives him of a part of his land, within the lines of his tract called Bye Fields Close, or subjects him to the plaintiff's action, for a trespass on Rotterdam, or William and James, he is equally within the operation of the rule, and in neither case is entitled to exemption from giving evidence in this cause.

There is another difficulty arising out of the consideration of the second and third bills of exceptions, which we deem it proper to notice. Thomas Burgess declined to give evidence of the boundary at B, although, in the execution of the warrant of resurvey, he was at the place where it stands, and was called upon by the plaintiff to testify in relation to it. Ought he to have been rejected as a witness on the trial for this cause? The usual course is to examine a witness on the survey, and to take his deposition *de bene esse*; and it is not the least among many advantages attending this practice, that the testimony of the same witness in Court, is applied more readily to designate points on the plots, and is, therefore, more perfectly understood by the Court and jury. This advantage is attained in this case. By Thomas Burgess being on the ground, at the time of the survey, at the boundary B, where he was called upon to give evidence, no mistake can arise as to the place at which he was required to prove the boundary, and his testimony on the trial can be as well understood, as if it was a repetition of what he had previously sworn in the country. Nor can we perceive that the offer to swear him, could produce any surprise on the opposite party, as the intention to make him a witness to a particular and designated boundary, was explicitly avowed on the execution of the warrant. For these reasons we are of opinion, that his testimony on the trial ought not

159 to have been * rejected on the ground that he was not a sworn witness on the resurvey.

The Court below certainly erred in admitting to the jury, the evidence mentioned in the fourth bill of exceptions. Giles G. Craycroft was not on the survey, and did not show to the surveyor the division line, designated by the letters i k on the plots, and his testimony in reference to it ought not to have been laid before the jury.

Judgment reversed, and procedendo awarded.

MITCHELL *vs.* DALL.—June, 1828.

Where one is indebted in several sums, and is about to make a part payment, he has an undoubted right to apply that payment, to either the one or the other of those claims, as he thinks proper; and the creditor is bound to apply the payment, as directed by his debtor. (a)

Although a debtor may not give an express direction at the time of the payment, to which, of several debts, a payment made by him shall be appropriated, yet a direction may be implied from circumstances; but if no application has been made by the debtor, either express, or implied, then the creditor may apply it. (a)

A copy of a letter addressed by a creditor to his debtor, contained in the letter-book of the former, advising the debtor that he had drawn on him for the amount of a particular purchase, is not evidence for such creditor in an action against a guarantee of the debtor, to establish that a payment shortly after received from such debtor, who was indebted on several accounts, was made in discharge of such purchase; though the draft itself, (or evidence of its contents if lost,) accompanied by a letter from the debtor to the creditor, regretting his inability to meet the draft, and promising speedy payment of that demand, followed by a payment a few days after the date of such letter, is evidence to show that it was made in discharge of that particular claim.

The letter of a debtor (or his acknowledged general agent,) to his creditor, directing him to which of two debts, a payment he was about to make him should be applied, is the best evidence, to show on what account such payment was received by the creditor. (b)

Such letter in an action by the creditor, against the guarantee of the debtor for one of his debts, where several were due, is not considered as merely the declarations of a third person, but it is an act by the party, who had the legal right to make the application of the payment, directing in what manner it should be made.

It is a general rule, that all the parties composing a firm must be named as plaintiffs, and an omission to name them, may be taken advantage of on *non assumpsit*; but there is an exception to this rule. for where there are dormant partners, it is not necessary they should be named in the writ. (c)

(a) Affirmed in *Mitchell vs. Dall*, 4 G. & J. 373. See *Guinn vs. Whitaker*, 1 H. & J. 429.

(b) Approved in *Mitchell vs. Dall*, 4 G. & J. 373.

(c) Approved in *Hopkins vs. Kent*, 17 Md. 74, and *Smith vs. Crichton*, 33 Md. 107. In actions *ex contractu*, if the cause of action be joint, all the parties, if alive, must join in bringing the action, which should be in their names, and not in that of the company or firm, where it is a company or firm that has the cause of action. *Armstrong vs. Robinson*, 5 G. & J. 413. In actions upon contracts where all the parties do not join as plaintiffs, the defendant may take advantage of the non-joinder upon proof at the trial, or he may plead such matter in abatement, or if it appear on the record by the pleadings. he may demur. *Ibid*; *Hoffar vs. Dement*, 5 Gill, 132; *Wallis vs. Dilley*, 7 Md. 238; *Smith vs. Crichton*, *supra*. Cf. *Oelrichs vs. Lurman*, 21 Md. 524. In actions upon joint contracts, all the parties liable ought to

160 * In the legal acception of the term dormant, as applied to partners in trade, every partner is considered dormant, unless his name is mentioned in the firm, or embraced under general terms as the name of one of the firm and company.

Where goods were sold to L, and D. agreed to become answerable for them as a guarantee, upon L's default to pay for them at a fixed day, in an action against D. on his guaranty, it is essential that the declaration should contain an express averment, that the debt was not paid by L. at the expiration of the time limited for payment; for until there was default on the part of L, no responsibility attached upon D.

To recover upon an *insimul computassent*, in such case, it must appear there was an accounting between the parties after L's debt was due and owing.

APPEAL from Baltimore County Court. This was an action of assumpsit to recover the sum of \$552.97, brought by the appellant, (the plaintiff in the Court below,) against the appellee, (the defendant in that Court.) The declaration contained five counts. The first averred, that on the 3d of January, 1821, at, &c. in consideration that the plaintiff, at the special instance and request of the defendant, would sell and deliver to Archibald Austin, agent of Jacob Lewis & Co. on a credit of four months, certain goods, wares and merchandise, the defendant undertook, and then and there faithfully promised the plaintiff, to be accountable to him for whatever goods he should sell and deliver to the said Austin at that time, on a credit of four months. And that, confiding in the promise of the defendant, he did on the day and year aforesaid, at, &c. sell and deliver to the said Austin, the agent aforesaid, on a credit of four months, certain goods of great value, at and for certain reasonable prices, then and there agreed upon between the said Austin and the plaintiff, amounting in the whole to the sum of \$600. And although the credit and time for payment of the price of the said goods, hath long since elapsed, yet the said Austin hath not, although often thereto requested, as yet paid the said sum of money, or any part thereof, but hath hitherto wholly neglected and refused so to do, to wit, at, &c. Of all which said premises the defendant afterwards, on, &c. at, &c. had notice; and thereby the defendant then and there be-

be made defendants; but the omission to do so can only, as a general rule, be taken advantage of by plea in abatement. *Brown vs. Warram*, 3 H. & J. 444; *Merrick vs. Bank*, 8 Gill, 74; *Smith vs. Cooke*, 31 Md. 174; *Sittig vs. Birkestack*, 38 Md. 163; *Cruzen vs. McKaig*, 57 Md. 464. But if it expressly appear on the face of the declaration, or other pleading of the plaintiff, that the party omitted was still living, as well as he that jointly contracted, the non-joinder can be taken advantage of by demurrer, or motion in arrest of judgment. *Loney vs. Bailey*, 43 Md. 17. The non-joinder as defendant of a secret or dormant partner, unknown to the plaintiff, is no ground for the abatement of the suit against the others. *Hopkins vs. Kent*, 17 Md. 72. See Rev. Code, Art. 64, secs. 88-90, as to amendments for non-joinder or mis-joinder of plaintiffs or defendants.

came liable to pay the plaintiff the said sum of money when he the defendant should be thereto afterwards requested; and being so liable, the defendant promised to pay, &c. The second count was on the same guarantee, though in a different form, stating, after the refusal * of Austin to pay, &c. That of all which premises the defendant, afterwards, to wit, on, &c. at, &c. had notice; **161** yet the defendant not regarding his said last mentioned promise and undertaking, hath not yet guaranteed or paid to the plaintiff the said last mentioned sum of money, or any part thereof, although requested, &c. The third count was for work and labor; goods sold and delivered; for money lent and advanced; and for money had and received, &c. The fourth count was for goods, &c. sold to Austin at the defendant's request; and the fifth count was on an *insimul computassent*. The defendant pleaded *non assumpsit*, on which issue was joined.

1. The defendant's first bill of exceptions. At the trial the plaintiff gave in evidence the following letter of guaranty, and the memorandum annexed to it, both of which was admitted to be in the hand-writing of the defendant. "Baltimore, January 3, 1821. Mr. M. P. Mitchell—Sir, As Mr. Archibald Austin, the agent of Jacob Lewis & Co. wishes to obtain some goods of you on a credit of four months, I hereby agree to guarantee the payment for the amount he may take at this time, if that will facilitate the business between you and him.

Yrs. &c.

JAMES DALL."

"Amount for which James Dall is responsible. Goods per

bill of M. P. M.....	\$372 07
Do. Charles Moss' bill.....	180 90

\$552 97"

The defendant then offered to prove, that at the date of the said guaranty, the plaintiff was a partner of Charles H. Appleton and William Henry, trading under the firm of M. P. Mitchell, and that the contract of guaranty was made by the defendant with the said copartnership, and not with the plaintiff; and the goods so delivered under the guaranty, were the goods of the said firm; and that the plaintiff did not carry on any business in his individual capacity at the time before and after the guaranty was entered into. Which evidence the Court, [ARCHER, C. J., HANSON and WARD, A. J.] on the motion of the plaintiff, rejected. The defendant excepted.

* 2. The defendant's second bill of exceptions. He prayed the Court to direct the jury, that the evidence having shown **162** that on the 25th of October, 1820, Mitchell, (the plaintiff,) Charles H. Appleton and William Henry, trading under the firm of M. P. Mitchell, sold to Jacob Lewis & Co. goods to the amount of \$395.89, and that the sale of goods referred to in the guaranty having been made, according to the direction of the Court as set forth in the

first bill of exceptions by the plaintiff, in his individual capacity; and the receipts for money paid by the defendant having been paid to, and receipted for, by the plaintiff; and no evidence having been offered of any appropriation of money by Lewis & Co. to the extinguishment of the debt due from them to the copartnership concern of M. P. Mitchell, the jury are bound to apply such payments to the extinguishment of the debt due from Lewis & Co. to the plaintiff in his individual capacity, for which debt the defendant was guaranty, and not to the debt due by Lewis & Co. to the copartnership of M. P. Mitchell. Which direction the Court refused to give. The defendant excepted.

3. The defendant's third bill of exceptions. He further moved the Court to direct the jury, that upon the whole of the evidence given in this cause, as set forth in the several bills of exceptions, if the jury believe the same, the plaintiff was not entitled to recover. Which prayer the Court refused to give. The defendant excepted.

4. The plaintiff's first bill of exceptions. The plaintiff, after having given in evidence the matters stated as having been given by him, in the defendant's bills of exceptions, further offered to give in evidence the following letters, purporting to be a copy of a letter from the said firm to J. Lewis & Co. the persons mentioned in the aforesaid guaranty of the defendant, dated Baltimore, the 7th of May, 1821, viz. "I have this day drawn on you at three days sight, in favor of J. C. Richards, Esqr. for \$395.89, amount of your purchase 25th October last, on six months credit. Your last purchase is also due.
M. P. MITCHELL."

The said copy of the said letter appearing and being copied in a book kept for the purpose of copying letters of the said * firm,
163 as proved by a competent witness, and was offered in evidence by the offer of the said book. The plaintiff also offered in evidence the following letter, admitted to be written by the agent of Lewis & Co. to M. P. Mitchell, which letter was produced on the trial by the plaintiff, dated Havre-de-Grace, May 8th, 1821, viz. "We regret to observe by yours of the 7th inst. that you have drawn upon us, at three days sight, for three hundred and ninety-five dollars and eighty-nine cents; not having funds here at this time to meet it, but we presume before the draft becomes payable, you will be paid the amount of it, having directed Mr. John P. Austin, who we dispatched on Saturday week to Norfolk, for money due by the government on deliveries of stone, to pay Mr. Dall the amount of the first invoice, to pay over to you, on his return through Baltimore. We wrote Mr. Dall to this effect; but as it would appear he has not informed you, we presume he must have been absent, as Mr. Austin was directed to return with all possible dispatch; and having intelligence of his leaving Old Point Comfort on Wednesday last, we have no doubt, he will be in Baltimore in a few days, when he

or Mr. Dall will call and pay the amount of your draft." Signed Jacob Lewis & Co. per A. Austin. To the admissibility of which letters, the defendant objected; and the Court sustained the objection, being of opinion that the said letters were not competent evidence. The plaintiff excepted.

5. The plaintiff's second bill of exceptions. The plaintiff then gave in evidence the following paper writing, being the letter of guaranty in the defendant's bill of exceptions. All of which were admitted to be in the hand-writing of the defendant; and proved the delivery of said goods to the amount of \$552.97, to Archibald Austin, the agent of Jacob Lewis & Co. and that on the 25th of October, 1820, he, as one of the firm of Appleton, Henry & Mitchell, which firm was carried on under the name of M. P. Mitchell alone, sold to the said Jacob Lewis & Co. goods to the amount of \$395.89. The defendant then gave in evidence the two following receipts and letter from the plaintiff to the defendant. "\$400. Baltimore, 164
* May 10th, 1821. Received of Jacob Lewis & Co. through
James Dall, four hundred dollars on account. M. P. MITCHELL.

"Baltimore, 16th June, 1821. Received of Mr. Jas. Dall, per account of Messrs. Jacob Lewis & Co. of Havre-de-Grace, four hundred dollars.

\$400.00.

M. P. MITCHELL.

"Baltimore 5th May, 1821. Mr. J. Dall—Dear Sir, I think it necessary to inform you, that the amount for which you have become responsible with me, for Mr. A. Austin, agent for J. Lewis & Co. becomes due this day. Very respectfully, your obt. servt.

M. P. MITCHELL."

The plaintiff to show that the amount specified in the first of said receipts, dated May 10th, 1821, was intended to be applied in discharging of the first debt of \$395.89, offered to prove, that he drew a draft on Jacob Lewis & Co. dated the 7th of May, 1821, at 3 days sight, for \$395.89, which on presentation was not paid, and which was returned to the plaintiff, and was by him mislaid, and for which he has made diligent search, but which he has been unable to find; and in connexion therewith offered to read in evidence the letter hereinbefore mentioned, dated the 8th of May, 1821, (written by Archibald Austin, who it was admitted was the general agent of Jacob Lewis & Co. and in whose hand-writing said letter was written;) and also offered in evidence, the receipt of the plaintiff dated 10th of May, 1821, to the defendant. To which last mentioned evidence; that is to say, proof of the draft drawn by the plaintiff on Jacob Lewis & Co. of the 7th of May, 1821, at 3 days sight, for \$395.89, and the letter from Austin, the defendant objected. Which objection the Court sustained. The plaintiff excepted.

6. The plaintiff's third bill of exceptions. The plaintiff, on the evidence stated in the prior bills of exceptions, as offered by both the plaintiff and the defendant, prayed the Court to direct the jury,

that if they are of opinion, from said evidence, that the payment of \$800, (made as appears by the receipts given in evidence by the defendant,) was not directed by Lewis & Co. or by the defendant, to

165 be applied to the discharge of the debt * due by Lewis & Co. guaranteed by the defendant, that the plaintiff had a right to apply such payment to the discharge of the debt of \$395.89, due before the guarantee, as given in evidence by the plaintiff. Which opinion the Court refused to give; but directed the jury, that although no express application of the money was made by Lewis & Co. or the defendant, yet the jury were at liberty to infer from the evidence that the payments made by the defendant were applied and intended to be made in payment of his guarantee to the defendant; and that unless they should find, that there was an application of the money by the defendant, at the time of the payment, either expressed or implied, that then the plaintiff had a right to apply the payments. The plaintiff excepted.

7. The plaintiff's fourth bill of exceptions. The plaintiff having given in evidence that he was one of the firm in which himself, and one Henry and one Appleton, were the others, further gave in evidence, that said firm was carried on under the name of M. P. Mitchell alone (the plaintiff in this cause,) and that all the books of said firm, checks drawn by the firm, and notes of sale by the firm, they being auctioneers, were all signed in the name of M. P. Mitchell alone. He further gave in evidence, that said firm trading under said name of M. P. Mitchell, did, on the 25th of October, 1820, sell to Lewis & Co., the persons mentioned in the prior bills of exceptions, merchandise to the amount of \$395.89. And also offered in evidence the guaranty of the defendant set forth in the prior bills of exceptions; and also that in consequence of the said guaranty the plaintiff, as one of said firm, sold to Austin the agent of Lewis & Co. the persons named in the said guaranty, goods and merchandise, to the amount of \$552.97 more. The defendant then offered in evidence the receipts stated in the prior bills of exceptions, and also, the letter from the plaintiff to him. The defendant, in addition to the evidence offered by him in the former bills of exceptions, also proved that the said Charles H. Appleton and William Henry, were active partners with the said copartnership concern, carried on as aforesaid under the firm of M. P. Mitchell, and that the said Appleton & Henry, were in the constant habit of attending to the business of said firm, equally with the plaintiff. The plaintiff then prayed the Court to direct the jury, that upon the evidence offered by him in this and the prior bills of exceptions, he was entitled to recover. Which opinion the Court refused to give. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued at June Term, 1827, before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

R. Johnson, for the appellant. * On the first and second bills of exceptions, he cited 2 *Stark. Evid.* 62; 3 *Stark. Evid.* 1620; **167** *Key vs. Parnham*, 6 *H. & J.* 418; *Wyman vs. Gray*, 7 *H. & J.* 409; *Drummond vs. Prestman*, 12 *Wheat.* 515; *Taney vs. Kemp*, 4 *H. & J.* 348; 3 *Stark. Evid.* 1091. On the fourth, he cited, 1. As to the application of the payment. *Gwinn vs. Whitaker*, 1 *H. & J.* 754; 3 *Stark. Evid.* 1092; *Plomer vs. Long*, 2 *Serg. & Lowb.* 334, (1 *Stark. Rep.* 153;) *Allstan vs. Contee*, 4 *H. & J.* 351; *Fowke vs. Bowie*, 4 *H. & J.* 566.

2. As to dormant partners, he cited *Cabell vs. Vaughan*, 1 *Saund.* 291 g, (4;) 1 *Chitty's Plead.* 8; *Gow. on Part.* 153, 17; *Leveck vs. Shaftoe*, 2 *Esp. Rep.* 469; *Hall vs. Smith*, 8 *Serg. & Lowb.* 112; *Lord Galway vs. Matthew*, 1 *Camp.* 403; *Guidon vs. Robson*, 2 *Camp.* 302; *Lloyd vs. Archbowl*, 2 *Taunt.* 324.

Williams (District Attorney of U. S.) and *Meredith*, for the appellee. On the first and second points, they cited 1 *Phill. Evid.* 54; 3 *Stark. Evid.* 1386, (and note;) *Evans vs. Beattie*, 5 *Esp. Rep.* 26; *Bacon vs. Chesney*, 1 *Stark. Rep.* 192; *Drummond vs. Prestman*, 12 *Wheat.* 515; *Newson vs. Douglass*, 7 *H. & J.* 417; 1 *Stark. Evid.* 47; *Dunn vs. Slee*, 3 *Serg. & Lowb.* 140; *Bateman vs. The City Bank of Baltimore*, 7 *H. & J.* 104; *Taney vs. Kemp*, 4 *H. & J.* 348. On the fourth point. 1st. As to the application of payments, they cited *Tayloe vs. Sandiford*, 7 *Wheat.* 20; 3 *Stark. *Evid.* 1091, 1093, **168** (note.) 2d. As to the dormant partners, they cited *Gow on Part.* 165; 3 *Stark. Evid.* 1070; *Teed vs. Elworthy*, 14 *East*, 210; *Dob vs. Halsey*, 16 *Johns. Rep.* 34; *Bryden vs. Taylor*, 2 *H. & J.* 396.

The appellee's counsel took an objection to the declaration; because there was no demand averred to have been made of the defendant, and of his refusal, &c. and that there should be proof to support such demand and refusal. They cited *McIver vs. Richardson*, 1 *Maule & Selw.* 557; *Morris vs. Cleasby*, 4 *Maule & Selw.* 574; *Bank of New York vs. Livingston*, 2 *Johns. Cas.* 409; *Grant vs. Ridsdale*, 2 *H. & J.* 186; 1 *Chitty's Plead.* 344.

R. Johnson, in reply. On the first and second points, he referred to *Owings & Piet vs. Low*, 7 *H. & J.* 124; *Riddle vs. Moss*, 7 *Cranch*, 206; 1 *Phill. Evid.* 54; *Ilderton vs. Atkinson*, 7 *T. R.* 480; *Birt vs. Kershaw*, 2 *East*, 458; 2 *Stark. Evid.* 300, (and note;) *Kahl vs. Jansen*, 4 *Taunt.* 567; *Townsend vs. Downing*, 14 *East*, 567; *Keightley vs. Birch*, 3 *Camp.* 523. On the fourth point, *Tayloe vs. Sandiford*, 7 *Wheat.* 20; *Teed vs. Elworthy*, 14 *East*, 209, 210; *Coursey vs. Baker*, 7 *H. & J.* 28. With respect to the alleged defect in the declaration, he cited 1 *Chitty's Plead.* 309. *Curia adv. vult.*

MARTIN, J. at this term delivered the opinion of the Court. In the trial of this cause, three bills of exceptions were taken by the defendant to opinions given by the Court below, and four by the plaintiff. As the defendant obtained a verdict, and no appeal has

been prosecuted by him, it will only be necessary to consider those presented to us by the plaintiff.

This is an action of assumpsit, instituted by Mitchell, upon an agreement in writing, by which Dall engaged, if Mitchell would furnish goods to Lewis & Co. through their agent, Archibald Austin, upon a credit of four months, he would guaranty the payment for them. This letter of guaranty was dated the 3d of January, 1821. Evidence was given to the jury, that goods to the amount of \$552.97, were delivered in * pursuance of this agreement; and also **169** that Lewis & Co. were indebted to Mitchell in another sum of \$395.89 for goods sold to them on the 25th of October, 1820. Dall, to discharge himself from the claim of Mitchell gave in evidence to the jury, two receipts signed by Mitchell, the first dated the 10th of May, 1821, and the second, on the 16th of June in the same year, each for the sum of \$400; and also a letter from Mitchell to Dall, dated the 5th of May, 1821, advising him, that the amount for which he had become responsible for Lewis & Co. was then due. Mitchell, to prove the money mentioned in the receipt of the 10th of May, 1821, ought to be applied to the discharge of the debt due by Lewis & Co. on the 25th of October, 1820, and not to that for which Dall was responsible, offered to give in evidence a copy of a letter, alleged to have been written by him to Lewis & Co. which copy was found in a book kept for the purpose of copying letters by the firm of which Mitchell was a partner; and who offered to prove, that he (Mitchell,) drew a draft on Lewis & Co. dated the 7th of May, 1821, at 3 days sight, for \$395.89, which was not paid, but was returned to him; which draft has been lost, and cannot be found; and in connexion with the said draft, offered to read in evidence the letter found in the record, written by Archibald Austin, as the agent of Lewis & Co. dated May 8th, 1821; but the Court refused to permit this evidence to go the jury. And whether this procedure was correct, is the only question presented to us by the first and second bills of exceptions, on the part of the plaintiff.

We agree in opinion with Baltimore County Court, that the copy of the letter found in the letter-book of the plaintiff, was not legal evidence for him in the cause, and that it was properly rejected; but we must dissent from them, so far as it relates to the evidence offered to show a draft was drawn on Lewis & Co. and the letter written by Austin, the acknowledged agent of that firm.

If the draft, drawn by Mitchell on Lewis & Co. had been in his possession, and he had it in his power to produce it, it certainly ought to have been produced; but when it was proved to have been lost, and could not be found, he ought to have been permitted to have given evidence of its contents.

170 * It is admitted in the record, that Austin was the agent of Lewis & Co. and it has been decided by this Court, that where an agency is sufficiently established, the acts and declarations

of the agent, within the scope of his authority, are to be considered as the acts and declarations of the principal, of which evidence may be given as if they had been done and made by the principal himself. *City Bank of Baltimore vs. Bateman*, 7 H. & J. 108. Lewis & Co. were indebted to Mitchell in two several sums of money, and were about to make a part payment; they had an undoubted right to apply that payment to either the one or the other of those claims, as they thought proper, and Mitchell was bound to apply it, as directed by his debtor. On the 8th of May, 1821, Lewis & Co. write to Mitchell, (for we consider the letter by Austin, their acknowledged agent, as their letter,) in substance, that they were about to remit to him a sum of money for the purpose of discharging the debt of \$395.89, for which a draft had been made on them. The money was received by Mitchell, and the question before the jury was, whether Lewis & Co. had given any directions to which debt this money should be applied? We think the letter was not only legal, but the best evidence, for the purpose for which it was offered. It was the direction of the debtor to the creditor, in writing, how this payment was to be applied. It was the creditor's authority for making the application, and after the receipt of this letter, he could not have rightfully applied it in any other manner. It has been contended that Lewis and Austin were legal witnesses in this cause, and ought to have been produced by the plaintiff. Admit they were competent witnesses, why was it necessary that he should have produced them? Was it to prove that Austin was the agent of Lewis & Co. That fact was admitted by the defendant, in the trial of the cause. Was it to prove that Austin wrote a letter to the plaintiff, as the accredited agent of Lewis & Co.? That fact was also admitted by the defendant; and if they were called on to prove the manner they had directed this payment to be applied, the moment they mentioned this direction was given in a letter, in the possession of the plaintiff, they would have been stopped from giving in evidence the contents of that letter, and the letter itself would have been demanded of the plaintiff.

* The defendant having admitted that Austin was the agent of Lewis & Co. and that he had, in that character, directed the application of the payment, in a letter to the plaintiff, the letter itself was the only legal evidence to show what that direction was. **171**

It was not merely the declarations of a third person, as was ingeniously urged in the argument, but it is an act done by the party who had the legal right to make the application of the payment, directing in what manner it should be made.

The third bill of exceptions was not relied on by the counsel for the appellant; we shall therefore pass it without notice; the law submitted to the Court in that exception, will, however, necessarily demand our attention in examining the fourth bill of exceptions.

The fourth bill of exceptions was a general prayer on the part of the plaintiff, that if the jury believed the evidence offered by him, they must find a verdict in his favor. This prayer was refused by the Court.

The first question to be disposed of under this exception is, whether Mitchell could sustain the action in his own name, and without joining his partners, Appleton & Henry, in the writ.

It is a general rule of law, that all the parties composing a firm must be named as plaintiffs, and an omission to name them may be taken advantage of, on *non assumpsit*. *Gow. on Partnership*, 164, 167, 153; but there is an exception to this rule, for where the partners are dormant, it is not necessary they should be named in the writ. *Gow.* 167, 153; *Lloyd vs. Archbuckle*, 2 *Taunt.* 324; *Leveck & Pollard vs. Shaftoe*, 2 *Esp. Rep.* 468; 1 *Chitty on Pleading*, 8.

What then constitutes a dormant partner, is the point upon which this part of the cause depends. In common parlance it appears a solecism in terms to say, that he who was actively engaged in the business, should be dormant, yet in the strict legal acceptation of the term, we are led to believe, every partner is considered dormant, unless his name is mentioned in the firm, or embraced under general terms, as the name of one of the firm and company. We are brought

172 to this conclusion, not * only by the definitions contained in elementary authors, but by adjudged cases upon this subject.

Gow. in his *Treatise of Partnership*, 12, 13, describes the several kind of partners. He says, "An actual ostensible partner, is a party who not only participates in the profits, and contributes to the losses, but who appears and exhibits himself to the world as a person connected with a partnership, and as forming a component member of the firm. A dormant partner is likewise a participant in the profits of the trade, but his name being suppressed and concealed from the firm, his interest is consequently not apparent." The same distinction is taken in *Watson on Partnership*, 34, 46. He says, "Sometimes all the partners in trade do not appear ostensibly to the world, though they share in the profits and loss, &c. Where they do not suffer their names to appear in the copartnership firm, but at the same time receive their share of the profits, and bear their risk of loss, they are styled dormant partners." In the case of *Lereck vs. Shaftoe*, 2 *Esp. Rep.* 468, Lord Kenyon held, "that if a person had been a partner, and his name in the firm, and he afterwards withdrew his name, but continued to receive part of the profits; though such person still continued liable to all the demands against the partnership on the ground of the profits he derived; he would not allow persons who dealt with the firm, without his name appearing in it, to avail themselves of the objection of such partner's not having joined in the action, for the purpose of a non-suit." See also the case of *Lloyd vs. Archbuckle*, 2 *Taunt.* 324; *Lucas and others vs. De la Cour*, 1 *Maul & Selw.* 249; and *Bryden vs. Taylor*, 2 *H. & J.* 396.

In this case it appeared the firm was carried on under the name of Mitchell alone; that all the books of the said firm, checks drawn, and notices of sale, were signed in his name; and that every part of the transaction, that gave birth to this suit, the letter of guaranty, and other evidence offered, was addressed to him alone, without reference to his partners. They were therefore dormant partners, and it was not necessary to name them in the writ.

The next question is the application of the payments made by Lewis & Co. And in deciding this question, we shall confine
*our remarks solely to the case as it appears in the record, **173**
without intending to lay down a rule of law, that will apply to every case that may possibly arise. We adopt the law, as declared by the Court in the third bill of exceptions, as correct in this case. That it is the undoubted right of the debtor to direct the appropriation of money paid by him to any debt he may think proper. And although he may not give an express direction, at the time of the payment, such direction may be implied from circumstances; but if no application has been made by the debtor, either express or implied, then the creditor may apply it.

Many cases might be produced to sustain this doctrine; we deem it necessary to refer only to a few. In *Tayloe vs. Sandiford*, 7 Wheat. 20, Chief Justice Marshall, in delivering the opinion of the Court, says "a person owing money under distinct contracts, has undoubtedly a right to apply his payments to which ever debt he may choose; and although prudence might suggest an express direction of the application of his payments, at the time of their being made, yet there may be cases in which this power would be completely exercised without any express direction given at the time. A direction may be evidenced by circumstances as well as by words. A payment may be attended by circumstances which demonstrate its application as completely as words could demonstrate it." In *Newmarch vs. Clay & others*, 14 East, 242, Lord Ellenborough said, "that there might be a special application of a payment made arising out of the nature of the transaction, though not expressed at the time in terms by the party making it." And it was admitted in the argument of that cause, as a general rule, and many cases cited in support of it, that if the debtor, who owes money on several accounts, do not apply a part payment when made, to a particular debt, but pay in the money generally, the creditor has a right to apply it to any part of his demand which he pleases. In the case of *The Mayor and Commonalty of Alexandria vs. Patton & others*, 4 Cranch, 320, Chief Justice Marshall declares it to be a clear principle of law, "that a person owing money on two several accounts, as upon bond and simple contract, may elect to make his payments to which account he pleases; but if he fails to make the application, the election passes from him to the creditor."

174 * Objections have been taken in this Court, to the sufficiency of the declaration filed in the cause, which we think justified the Court below in refusing the prayer of the plaintiff in the fourth bill of exceptions. The agreement, which is the foundation of this suit, is susceptible of but one rational construction. That Lewis & Co. being desirous to purchase goods, &c. of Mitchell, through the agency of Archibald Austin, Dall engages, if the goods are furnished to Lewis & Co. upon a credit of four months, and they do not pay for them at the expiration of that time, that he will do it. The goods then are sold to Lewis & Co. They are the original debtors, and upon their default, and their default alone to pay, Dall becomes answerable. Austin has nothing to do in the transaction, but merely as an agent for Lewis & Co. No sale is made to him individually, nor is he bound to pay for the goods. It is essential, therefore, that the declaration should contain an express averment, that the money was not paid by Lewis & Co. at the expiration of the time limited for payment; for until there was default on the part of Lewis & Co. no responsibility attached upon Dall.

The first count, instead of stating the money had not been paid by Lewis & Co. (the condition upon which Dall had agreed to pay,) says Austin did not pay it. Austin was not bound to pay it. He was not the debtor, nor did Dall assume any responsibility upon the non-payment by Austin.

The declaration, to be effective, ought to have averred the non-payment by Lewis and Co. for it by no means follows, that although not paid by Austin, that Lewis & Co. may not have discharged the debt.

The same objection applies to the second count. It is stated that Austin, and not Lewis & Co. did not pay. The third count has no reference to the guaranty; it charges Dall with goods, &c. money lent, &c. furnished to him on his own account, and for his own use, and not as being charged with a debt, upon the default of another to pay it. The fourth count is supposed to be sufficient; because on default of Lewis & Co. to pay, it was unnecessary to set out the special agreement in the declaration, but that it might be given in evidence on the general count. If this position were correct, it would not support the count. If the rule relied on could be applied

175 to this case, * still it was necessary to set out the transaction as it appeared in evidence—that the goods, &c. were sold to Lewis & Co. and Dall promised to pay for them. But in this count, Lewis & Co. are entirely lost sight of. It is stated, not as a debt contracted by them, but by Archibald Austin; and surely evidence that Dall promised to pay the debt of Lewis and Co. will not make him answerable for a debt contracted by Austin on his own account. The fifth count is on an *insimul computassent*; and whether this can be sustained, must depend upon the evidence in the cause. The responsibility of Dall under the guaranty, did not attach until default

was made by Lewis & Co. to pay, nor was there any debt due and owing by him until the expiration of the time limited for payment. His undertaking was collateral and conditional, and to make him answerable upon an *insimul computassent*, it must appear there was an accounting between the parties, after the debt was due and owing; and such is the express language of the declaration.

This is not like a debt between two persons, on their own account, with a future time for payment; there the debt is due, when the goods are delivered. But in this case, as before observed, the assumption is conditional; there is no debt before default, nor is there any legal demand on Dall, until that time. The evidence offered by the plaintiff, to support this count, was a memorandum signed by Dall, admitting the amount of the goods delivered under the guaranty; but that writing has no date. If it should be found by the jury, that the memorandum was signed after the time limited for payment, it may be sufficient to charge Dall on the *insimul computassent*; if before, it could only be evidence to show the amount of the claim, on a count founded on the special agreement.

An objection was also made to the declaration, that it did not contain an averment, that a demand had been made on Lewis & Co. for payment, before this suit was brought. Having declared all the counts founded on the guaranty insufficient, it is unnecessary to consider this objection.

Judgment reversed, and procedendo awarded.

* MOCKBEE'S Adm'r *vs.* GARDNER *et ux.*—June, 1828. 176

It is a general and familiar principle, that there exists in every sale of personal property an implied warranty of title, and that the vendor cannot be a witness to sustain the title of his vendee. (a)

Executors, administrators and other trustees, are exceptions to that rule, and a sale by them does not imply a warranty of title.

In sales by them, if fraud exists, or there is an express warranty and eviction, they would undoubtedly be personally answerable to a purchaser.

And in the case of a failure of title, while the purchase money for the property sold remained in their hands undistributed or unadministered, there would exist no well founded reason why they should not refund to a purchaser.

Executors, administrators and other trustees are competent witnesses for purchasers of personal property claiming under their sales; and if objected to, on the ground of special liability to their vendees, that

(a) Cited in *Heskett vs. Borden Co.* 10 Md. 185. and *Rockwell vs. Young*, Court of Appeals, October Term, 1883. In the latter case it is said that in every sale of personal property, there is an implied warranty of title. See *Fenwick vs. Forrest*, 5 H. & J. 338; *Giese vs. Thomas*, 7 H. & J. 333; *Osgood vs. Lewis*, *post*, m. p. 495.

objection must be proved by the party making it, before the Court will reject their evidence.

APPEAL from Montgomery County Court. This was an action of trover for a negro slave named William, brought by the intestate of the appellant against the appellees. The death of the original plaintiff was suggested, and the appellant, as his administrator, made plaintiff. The defendants pleaded not guilty, and issue was joined.

At the trial the plaintiff offered to prove by John W. Duvall, that the plaintiff's intestate purchased of the witness as the administrator of William Warfield, deceased, the negro mentioned in the declaration, and that the said negro, at the time of the death of the said intestate, was his property, and at the time of the sale was a part of the assets of the said intestate. To which witness the defendant objected, as incompetent to prove that the said negro, at the time of the death of the said Warfield, was his property, and at the time of the said sale was a part of the assets of the said intestate's estate. Which objection was sustained by the Court, [DORSEY, C. J., KILGOUR and WILKINSON, A. J.] and the witness for the purpose, rejected. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE and ARCHER, JJ.

177 * Boyle, for the appellant, cited *Goodtitle vs. Welford*, 1 Doug. 138, 139, 140; *Anon.* 1 Mod. 107; *Swift's Evid.* 57, 58; 1 *Phill. Evid.* 40, 41; *Nix vs. Cutting*, 4 Taunt. 18; *Goss vs. Tracy*, 1 P. Wms. 287; *Abrahams vs. Bunn*, 4 Burr. 2254; *Briggs vs. Crick*, 5 Esp. Rep. 99, 100; *Cushman vs. Loker*, 2 Mass. 106; *Lupton vs. Lupton*, 2 Johns. Ch. 625.

F. S. Key, for the appellees, cited *Giese vs. Thomas*, 7 H. & J. 458.

ARCHER, J. delivered the opinion of the Court. It is a general and familiar principle, that there exists in every sale of personal property, an implied warranty of title, and that the vendor cannot be a witness to sustain the title of his vendee.

But in this case the witness had made the sale of the property in controversy as an administrator. He was a mere trustee, and in that capacity sold the property. The exemption of executors, administrators, and other trustees, from personal responsibility on an implied warranty, seems to be indispensable. For who would accept an office of this kind, if he were to become necessarily the guarantee of the good title of him whom he represents, in all the property submitted to his charge, which he may be obliged by order of Court to sell? In all cases in which the title sold, was ascertained to be defective after a final distribution of the estate, the

administrator, if a recovery were had against him, would have to look for indemnity to creditors, distributees and legatees. In most instances his prospect of security would never be realized, and no power is given him to retain for such a contingency. Where fraud exists, or there is an express warranty, he would, undoubtedly, be personally answerable to a purchaser in case of eviction. But it would little comport with the policy of the law, that offices so necessary, should be subjected to the operation of a principle so fraught with danger to their interests, as to deter every one from their acceptance.

But while this exception from the general principle exists in their favor, we by no means intend to assert that they would not be answerable, in case of a failure of title, while the purchase money for the property sold remained in their hands undistributed and unadministered. In such a case there would exist no * well founded reason why they should not refund to a purchaser. **178** Such a modified liability would subject them to no danger of pecuniary loss; and as long as the fund remained in their hands, they might well be considered as liable, with other vendors, to the general doctrine of implied warranty of title. Whether that were the case, in the suit under consideration, the bill of exceptions does not disclose. It was surely incumbent on the party objecting to the competency of the witness, that he should make the grounds of incompetency appear to the Court, which could only be done by showing that the purchase money still remained in the hands of the administrator; and there being nothing to show this fact the witness was competent.

Judgment reversed, and procedendo awarded.

OFFUTT'S Adm'rs *vs.* OFFUTT.—June, 1828.

Where there is a full recovery, the record of it may be given in evidence on *non assumpsit*; and it is conclusive in bar, if the subject-matter in dispute has been before decided on by a Court of competent jurisdiction, between the same parties. (a)

The record of an action of *assumpsit* between the same parties, in which the jury assessed the plaintiff's damages at a less sum than \$50, and the Court, for want of jurisdiction, gave judgment for the defendant, treating the verdict as a nullity, is no evidence of the former recovery of the debt due from the defendant to the plaintiff, nor can it operate as a bar in another action for the same debt. (b)

A second suit brought on the same cause of action, cannot be sustained by the verdict in the former suit, where the sum ascertained by the jury was below the jurisdiction of the Court.

(a) As to defence of a former recovery and plea of *res adjudicata*, see *Shafer vs. Stonebraker*, 4 G. & J. 345; *Whitehurst vs. Rogers*, 38 Md. 503; *Walsh vs. Canal Co.* 59 Md. 423.

(b) Affirmed in *Schindel vs. Suman*, 13 Md. 313.

APPEAL from Montgomery County Court. This was an action of assumpsit, in which the declaration of the plaintiffs below, (now appellants,) against the defendant, (the appellee,) contained sundry counts. Two for sundry matters and articles properly chargeable in account, as by particular accounts thereof, therewith in Court exhibited; and the others were the ordinary money counts. The plaintiffs filed with their declaration two accounts—one charging the defendant as indebted to the plaintiffs' intestate, for work done, &c. commencing on the 8th of April, 1816, and ending on the 6th of November, 1819, amounting to \$122.37½. The other charging the

179 defendant as indebted * to George Heeter for work done, &c. commencing on the 9th of January, 1808, and ending on the 14th of December, 1808, amounting to £5 19 8. This last account was assigned by Heeter to the plaintiffs' intestate on the 9th of September, 1811. The defendant pleaded *non assumpsit*, and issue was joined.

1. At the trial the plaintiffs offered to prove to the jury, by a competent witness, the items contained in the foregoing account filed in this cause. But the defendant objected thereto; and to show the said testimony to be inadmissible, offered in evidence a record of an action of assumpsit brought in the said Court by the same plaintiffs, against the same defendant, on the 17th of February, 1821, in which an account similar to that herein first above mentioned, was exhibited with the plaintiffs' declaration in that action, except that there was an additional charge in that account of two articles, amounting to \$23, which are omitted in the plaintiffs' first mentioned account in this action. The defendant in that action filed in Court an account in bar to the claim of the plaintiffs, amounting to \$105.30. Issue was joined on the plea of *non assumpsit*; and at the trial of the cause at March Term, 1822, the jury found a verdict in favor of the plaintiffs for the sum of \$41.74; and as the sum so found did not exceed \$50, judgment was rendered for the defendant for his costs. The defendant proved that the suit mentioned in the said record was between the same parties as those in this suit, and that the items in the account here produced are the same in the account which was filed in the former suit. And he insisted that the verdict and proceedings aforesaid were a bar to this suit upon the same cause of action. Of which opinion was the Court, [KILGOUR, A. J.] and accordingly refused to permit the plaintiffs to prove the items in the said account, and so instructed the jury. The plaintiffs excepted.

2. The defendant having offered in evidence the record in the former trial between the same parties, as above mentioned, the plaintiffs then claimed the amount of the said verdict, as stated in the said record, as due to them. But the Court was of opinion that

180 the said evidence was inadmissible as proof of * anything due from the defendant to the plaintiffs, upon which they

could recover in this Court; and so directed the jury. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE and ARCHER, JJ.

Z. Magruder, for the appellants, cited 1 *Phill. Evid.* 234, (note;) *Borden vs. Fitch*, 15 *Johns.* 121; 1 *Phill. Evid.* 235; *Soddon vs. Tutop*, 6 *T. R.* 607.

No counsel appeared for the appellee.

EARLE, J. delivered the opinion of the Court. These appellants were plaintiffs in Montgomery County Court, and instituted their suit on a long account for blacksmith's work, commencing the 8th of April, 1816, and ending the 6th of November, 1819, and amounting to \$122.37½. To this they tacked a small account of £5 19 8, assigned to their intestate, and for the whole declared in various ways, and among others, for an account brought into Court with their declaration.

* The defendant pleaded *non assumpsit*, and when on the trial, the plaintiffs produced their account, and offered to prove the several items of it, the defendant objected; and to show the testimony inadmissible, he presented a record of Montgomery County Court, of a suit between the same parties, for the account of \$122.37½, and insisted it was a bar to the recovery in this case; and fully demonstrated that the evidence offered by the plaintiffs was not admissible. The Court were of this opinion, and refused to permit the plaintiffs to prove the items of their account. The record produced was the record of a suit between the same parties, and on the same account of \$122.37½, with two additional articles to the amount of about \$23; opposed to which was an account in bar of Osgood Offutt's against James Offutt of William, which reduced the plaintiffs' verdict to \$41.74, a sum below the jurisdiction of the Court. For want of jurisdiction, no judgment was rendered on the verdict; but the judgment rendered was for the defendant, for his costs. This is the substance of the first bill of exceptions; and it is made a question, whether the record of this proceeding, thus conducted, and thus eventuating, is a bar to a recovery in the present action, or can be given in evidence as such? 181

It appears to us, that this record was offered prematurely, before the plaintiffs had given proof of the items of their accounts, and more particularly so, as the tacked account had not been an object of controversy in the former suit. But if the record had been offered in evidence at a proper time, we are of opinion that it could not operate as a bar to the present action, and could not be received in evidence as such. Where there is a full recovery, the record of it may be given in evidence on *non assumpsit*, and it is conclusive in

bar, if the subject-matter in dispute has been before decided on by a Court of competent jurisdiction, between the same parties. In the case before us, there was no recovery had by the plaintiffs in the former suit, because Montgomery County Court wanted jurisdiction to give them a judgment. The jury ascertained the sum of their damages, but the ascertainment is of no avail, and as to them the verdict is a nullity. It cannot be made the foundation of a further claim against the defendant; and unsupported by
182 a * judgment, it cannot, under any circumstances, be made evidence before a jury. It certainly will not answer the purpose for which it was produced by the defendant. It will not witness a former recovery of the debt due from the defendant to the plaintiffs' intestate.

The opinion of the Court below on the other bill of exceptions, is a correct one. It is supported by the case of *Read & Miller vs. Hannan*, in which there was a *nisi affirmance* in this Court at December Term, 1807. This case we have examined, and approve of the decision therein of Baltimore County Court. It establishes the position, that a second suit brought on the same cause of action cannot be sustained by a verdict in the former suit, where the sum ascertained by the jury is below the jurisdiction of the Court.

Judgment reversed, and procedendo awarded.

FERGUSON *vs.* TUCKER.—June, 1828.

No principle of pleading is more firmly settled, than that whether the action be in debt, *assumpsit* or tort, if it be necessary to allege a contract, such allegation requires corresponding proof.

In an action for harboring an apprentice, to entitle the plaintiff to recover, he must allege the tenor, or substance, and legal effect of the indenture of apprenticeship.

Where a plaintiff, in attempting to conform to this requisition, averred, "that H, then and from thence hitherto," (that is, until the date of issuing the writ,) was his apprentice, his statement is falsified by proof, which showed that the contract of apprenticeship had ended prior to that time; and those words being of the very substance of the contract declared on, could not be rejected as surplusage, and, therefore, he could not recover.

In such action a knowledge of the apprenticeship by the defendant, is an indispensable requisite to recovery.

Although at the time of hiring an apprentice, a defendant may have been ignorant of the apprenticeship: yet if after obtaining that information he continues to harbor him, he is liable to an action at the suit of the master, without any proof of either a demand or refusal.

As soon as the new master acquires a knowledge of the apprenticeship, he is bound to discharge the apprentice, that he may not hold out to him an inducement not to return to his original master.

That prerogative of the Court which authorizes them to withdraw from the jury the consideration of the facts, is never exercised but in cases where the evidence is so indefinite and unsatisfactory, that nothing but wild * irrational conjecture, and licentious speculation, could induce a jury to pronounce the verdict which is sought at their hands. **183**

(a)

Where an apprentice absconded on the first of the month, and notice of that fact, with a caution against harboring him, was published in a daily paper on the fourth, which paper was taken by the defendant, in whose employment the apprentice had been from the first, and afterwards continued; and the defendant afterwards being applied to by the master, for payment of his apprentice's services, was informed that he was an apprentice to the plaintiff, refused to pay for his services, and expressed no surprise at such information, nor pretended that he had been previously ignorant, of his so being an apprentice, such proof is proper to be weighed by a jury, who are to determine whether the defendant knew after the fourth, that the person in his employment was an apprentice; and the Court ought not in such case, to say that the jury could not find such knowledge.

An unnecessary averment of a breach or infringement of a contract declared on, need not be proved, and may be rejected as surplusage.

APPEAL from Baltimore County Court. The plaintiff in that Court, (now appellee,) brought an action on the case against the appellant, (the defendant therein,) on the 17th of July, 1822. The declaration contained two counts—1. That John Holland, on the 1st of July, 1821, at, &c. "was, and from thenceforth hitherto hath been, the apprentice and servant of the plaintiff, and as such apprentice and servant, then and there, to wit, on, &c. at, &c. lived and resided with the plaintiff; yet the defendant, well knowing the premises, but contriving, &c. to injure the plaintiff, &c. on, &c. at, &c. wrongfully, and unjustly, and without the license and consent, and against the will of the plaintiff, persuaded, procured and enticed the said Holland, so then and there being the apprentice and servant of the plaintiff, to absent himself, and depart from the service of the plaintiff, to wit, &c. On pretext of which said persuasion, &c. the said Holland, the apprentice and servant of the plaintiff, afterwards, to wit, &c. at, &c. without license, &c. of the plaintiff, wrongfully and injuriously departed and absented himself from the service of the plaintiff, and continued absent and apart from his said service for a long time, to wit, from thence for the space of twelve months, then next ensuing; whereby the plaintiff, during all that time, wholly lost the benefit, &c. which by reason of the service of his said apprentice he might and ought to have had and received, and otherwise should and would have received."

* 2. Count. That afterwards, to wit, on, &c. at, &c. "one other John Holland, then and from thence hitherto, being a certain other apprentice and servant of the plaintiff, unlawfully, and **184**

(a) Approved in *Cole vs. Hebb*, 7 G. & J. 33. See *Davis vs. Davis*, 7 H. & J. 28.

without the license, and against the will of the plaintiff, departed and went away from the service of the plaintiff, and then and there went and came to the defendant; yet, the defendant, well knowing the said Holland, the said last mentioned apprentice, to be the servant and apprentice of the plaintiff as aforesaid, then and there received the said Holland, and wholly refused to deliver him to the plaintiff, his master, although so to do, to wit, on, &c. and often times since, at, &c. he was requested by the plaintiff; but the defendant unlawfully detained and entertained and kept the said Holland, so being the apprentice of the plaintiff from his said service, from the 1st of July, 1821, for a long space of time, to wit, for the space of twelve months from thence next ensuing; whereby the plaintiff wholly lost the profit, &c. which he, by reason of the service of the said Holland, during all that time ought and might have had and received and otherwise should and would have had and received, to wit, at, &c. to the damage of the plaintiff in the sum of," &c. The defendant pleaded not guilty, and issue was joined.

At the trial the plaintiff read in evidence an indenture of apprenticeship, dated the 10th of May, 1817, and which it was admitted was executed by the several parties thereto, and approved and recorded, as thereby and thereon appeared. By this indenture two justices of the peace of Baltimore County placed and bound out, by and with the consent of his mother, John Holland, an orphan boy 13 years old, on the 4th of March then last past, to James Tucker, until he attained the age of 21 years; and that he was to be taught the trade of a cordwainer, &c. The plaintiff further gave in evidence, that one of the parties to the said indenture, John Holland, the apprentice named in the said indenture, is the same person mentioned in the plaintiff's declaration; and that James Tucker, one of the parties thereto, is the plaintiff. He further gave in evidence that the said apprentice, John Holland, after the date of the said indenture continued, by virtue of the said indenture, to

185 * live with the plaintiff as an apprentice, until the 1st of July, 1821, when he absconded from the service of the plaintiff, without cause, and without the leave or license of the plaintiff, and on the same day shipped on board a vessel in the port of Baltimore, belonging to the defendant, with the knowledge and by the request of the defendant. He further gave evidence, that the said apprentice continued in the defendant's employ for eleven months after the 1st of July, 1821, and that the value of his services, during that time, was four dollars a week, net profit. He also gave in evidence, that on the 4th of July, 1821, he caused an advertisement to be inserted in the newspaper in the City of Baltimore, called *The American*, offering a reward for the apprehension of the said apprentice; and that the defendant, during the time in which the said advertisement appeared in the said newspaper, was a subscriber to the said paper, and received it daily. The advertisement was as follows:

"Six Cents Reward. Ran away from the subscriber, on Sunday the first of July, an apprentice to the cordwaining business, named John Holland, aged about 17 years, 5 feet," &c. "Masters of vessels, and all others, are forewarned not to harbor in any manner whatsoever said boy, as the law will be put in force to the utmost. The above reward will be given if brought home, and no charges paid." Dated the 4th of July, and signed by the plaintiff. It was certified by the publishers of the newspaper to have been inserted every other day for four times, commencing on the 4th of July, 1821. The plaintiff further gave in evidence, that when the defendant was called on for payment on account of the said services rendered by the said apprentice to the defendant, the latter absolutely refused to pay any thing; and being told that he was an apprentice to the plaintiff, he expressed no surprise at such a declaration, nor pretended that he had been previously ignorant of his so being an apprentice. The defendant then offered in evidence a record of proceedings in Baltimore City Court, by which the said apprentice was, on the 1st of July, 1822, on his petition, and the consent of the plaintiff, discharged from his indenture to the plaintiff, he ceasing to be a cordwainer, and bound for the residue of his time to David Bangs, to be taught the trade of a cordwainer, &c. The defendant then prayed the opinion of * the Court, and their direction to the jury, that upon all the evidence and the pleadings in the cause, the plaintiff was not entitled to recover. Which opinion the Court, [HANSON, A. J.] refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court. **186**

The cause was argued before BUCHANAN, C. J., EABLE, MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

Meredith and R. Johnson, for the appellant, cited 1 *Chitty's Plead.* 231, 306; 2 *Chitty's Plead.* 389; *Bristow vs. Wright & Pugh*, 2 *Doug.* 664; *Rogers vs. Allen*, 1 *Campb.* 309, 313; *Weall vs. King*, 12 *East*, 452; *Abitbol vs. Bristow*, 1 *Serg. & Lowb.* 454; *James vs. Le Roy*, 6 *Johns.* 274; *Fores vs. Wilson*, *Peake's N. P. Cas.* 55; *Peake's Evid.* 334; *Norr. Peake*, 544, 545; 3 *Blk. * Com.* 142; *Winsmore vs. Greenbank*, *Willes*, 582; 3 *Stark. Evid.* 1310; *Rowley vs. Horne*, 11 *Serg. & Lowb.* 1; 1 *Phill. Evid.* 306; *Davis vs. Davis*, 7 *H. & J.* 36; *Peake's Evid.* 334; *Norr. Peake*, 545; 3 *Blk. Com.* 142; 3 *Stark. Evid.* 1310; 1 *Chitty's Plead.* 322 to 324; *Winsmore vs. Greenbank*, *Willes*, 582; and the Act of 1793, ch. 45. **187**

Williams, (District Attorney of U. S.) for the appellee cited, 4 *Bac. Ab. tit. Master and Servant*, (O) 593; 1 *Chitty's Plead.* 232, 306; 6 *Com. Dig. tit. Pleader*, (C. 28,) 60, (*New Ed.*); *Hoar vs. Mill*, 4 *Maule, & Selw.* 470; *Allaire vs. Ouland*, 2 *Johns. Cas.* 52; *Lansing vs. M'Kilip*, 3 *Caine's Rep.* 286; *Jerome vs. Whitney*, 7 *Johns.* 321; *Coke Litt.* 303 b; *Bristow vs. Wright & Pugh*, 2 *Doug.* 665; *Abitbol vs. Bristow*, 1 *Serg. & Lowb.* 454; *United States vs. Vickery*, 1 *H. & J.* 437; 1

Chitty's Plead. 233, 234, &c.; *Towson vs. The Havre-de-Grace Bank*, 6 H. & J. 47; *Winsmore vs. Greenbank, Willes*, 583, 584; *Blake vs. Lanyon*, 6 T. R. 221; *Chase vs. Taylor*, 4 H. & J. 60, 61; *Leeson vs. Holt*, 2 Serg. & Lowb. 349; *Jenkins vs. Blizard, Ib.* 451; * 1 Stark. 188 *Evid.* 398; *Laidlow vs. Organ*, 2 Wheat. 178; *Etting vs. Bank of United States*, 11 Wheat. 59; *Davis vs. Davis*, 7 H. & J. 36; *Morris vs. Caldwell*, 1 H. & G. 107; *James vs. Le Roy*, 6 Johns. 274; 2 *Chitty's Plead.* 310, (269;) 4 *Bac, Ab. tit. Master & Servant*, (O) 593; *Blake vs. Lanyon*, 6 T. R. 221; 3 *Blk. Com.* 141, 142, (notes;) *Winsmore vs. Greenbank, Willes*, 582; 1 *Chitty's Plead.* 322.

DORSEY, J. delivered the opinion of the Court. There being no evidence to support the first count in the declaration, the refusal of the County Court to grant the defendant's prayer, "that upon all the evidence and the pleadings in the cause, the plaintiff was not entitled to recover," can only be sustained by its appearing that all the material allegations in the second count, have been established by proof before the jury.

No principle of pleading is more firmly settled, than that whether the action be in debt, assumpsit or tort, if it be necessary to allege a contract in the declaration, such allegation requires proof corresponding therewith.

* To entitle the plaintiff below to recover, he must allege 189 the tenor or substance and legal effect of the indenture of apprenticeship. He has attempted to conform to this requisition by stating that "John Holland then, and from thence hitherto," (that is, until the 17th of July, 1822,) was his apprentice. His statement is falsified by the proof, which shows that the contract of apprenticeship expired on the 1st of July, 1822, in virtue of the proceedings in Baltimore City Court.

There being then an essential variance between the contract alleged, and that made out in proof, the County Court ought to have instructed the jury, as they were required to do, that upon all the evidence and pleadings in the cause, the plaintiff was not entitled to recover. And these words "and from thence hitherto," being of the very substance of the contract, cannot be rejected as surplusage. But suppose they were, the condition of the appellee is not changed for the better. Strike out those words, and the plaintiff below sets forth in his pleadings no cause of action, but for harboring his apprentice on the 1st of July, 1821. To sustain which the proof offered is wholly insufficient—A knowledge of the apprenticeship by Ferguson, during the harboring, being an indispensable requisite to recovery; and the testimony adduced not even insinuating such knowledge anterior to the 4th of July, 1821.

Other grounds have been assigned for the reversal of this judgment; and as this case must be sent back on *procedendo*, it is right that this Court should not pass them over in silence. It is insisted

that the defendant's instruction ought to have been given; because the proof of knowledge of the apprenticeship in Ferguson, was too light and inconclusive to have been left to the jury to find that fact. This Court think otherwise. It is true, the facts in evidence fall far short of full or conclusive proof; and we by no means intimate, that we would have drawn from them the same conclusion which has been found by the jury. But it by no means follows, even if the verdict would not be satisfactory to the minds of the Court, that they would feel themselves authorized to withdraw from the jury the consideration of the facts. This prerogative of the Court is never exercised, but in cases where the evidence is so indefinite and unsatisfactory that nothing but wild, irrational conjecture, * or licentious speculation, could induce a jury to pronounce the verdict which **190** is sought at their hands. The testimony here cannot be viewed in that light. The conduct of Ferguson, when payment was demanded for the services, and notice given of the apprenticeship of Holland, were such as cannot fail to excite strong suspicions, that he knowingly harbored him. Few men, under such circumstances, if the information were new, would have failed to evince some surprise at it; and still more, few would have hesitated to rescue their conduct from censure or suspicion, by asserting their ignorance of a fact, the knowledge of which was necessarily imputed by the demand. When in corroboration of the inferences derivable from the act of Ferguson, we advert to his daily receipt of the newspaper containing the information ascribed to him, we think it would be transcending the powers of the Court, and stretching the right of instruction further than it has ever yet been carried in this State, to refuse to permit the testimony to be weighed by the jury, whatever may be our opinions as to the result to which their deliberations ought to lead them.

Another ground on which the appellant relies for the reversal of the judgment is, that inasmuch as it appears, that at the time of the employment of Holland, Ferguson knew not of the apprenticeship, no action can be maintained against him, until after a demand of the apprentice, and a refusal to deliver him up; a position not unsupported by authority, as appears by reference to *Norris' Peake's Ev.* 545; 3 *Stark. Ev.* 1310; *Winsmore vs. Greenbank, Willes*, 582; 3 *Blk. Com.* 141. But to this doctrine we are not disposed to subscribe our assent. Although at the time of hiring, Ferguson may have been ignorant of the apprenticeship of Holland, yet, if after obtaining that information, he continued to harbor him, he is liable to an action at the suit of the master, without any proof of either demand or refusal. Whether the knowledge be possessed before the hiring, or after the hiring, is immaterial, either as we regard the nature of the injury, or its consequences upon society. As soon as the new master acquires the acknowledge, he is bound to discharge the apprentice, that he may not hold out to him an inducement not to return to his original master. And his obligation to do so is equally im-

191 perious, whether the master * remain in total ignorance where his apprentice may be found, or knowing that fact, make a regular demand of him. Such is the policy of our law, as evinced by the Act of 1793, ch. 45, s. 8. Such is the doctrine in England, as established by the King's Bench, in *Blake vs. Lanyon*, 6 T. R. 221.

The demand and refusal charged in the declaration in this case, being the unnecessary averment of the breach or infringement of the contract stated, need not be proved, and may be rejected as surplusage.

Judgment reversed, and procedendo awarded.

STRIKE *vs.* McDONALD & SON.—June, 1828.

A final decree, or a decretal order passed by the Court of Chancery, or the County Court as a Court of equity, from which an appeal might have been taken within a limited period, after the expiration of such period, in the further progress of the cause in which it was pronounced, and in the absence of any other ground of error than what the prior proceedings themselves disclosed, will be considered as conclusive upon the rights of the parties, as well in the Court of original jurisdiction, in which further proceedings were necessary to carry such decree, or order, into execution, as in the Appellate Court to which the case was ultimately carried.

(a)

Where a cause was transmitted from Baltimore County Court to the Court of Chancery under the Act of 1824, ch. 196, the Chancellor properly viewed all the proceedings as having taken place in the same tribunal.

A decretal order should be appealed from within nine months from the time of making it by the terms of the Act of 1785, ch. 72. s. 27. (b)

The enlargement of the equity jurisdiction of the County Courts gave them powers concurrent with those of the Court of Chancery, and necessarily took with it all the laws and regulations relating to equity matters in that high tribunal.

The right of appeal from a decretal order of the Court of Chancery is not a permissive privilege to be exercised or not in the election of the party, and postponed at his pleasure until the final decree.

Whoever comes into the possession of an estate by fraud must account for rents and profits when the fraudulent conveyance is vacated. (c)

Where a decree annulled certain deeds as fraudulent, and ordered the property mentioned in them to be sold, and reserved all equities as to the distribution of the proceeds for hearing on the trustee's report of the sale being filed, this reservation was held to have no view to the interest of the fraudulent grantee; and the deeds having been vacated, because

(a) Cited in *Dugan vs. Gittings*, 3 Gill, 152, 153. Under Rev. Code, Art. 71, sec. 42, on an appeal from a final decree or order, all previous orders which may have been passed in the cause shall be open for revision in the Court of Appeals, unless an appeal shall have been taken from such order. See *Snowden vs. Dorsey*, 6 H. & J. 94, and cases in note (a).

(b) See Rev. Code, Art. 71, s. 40.

(c) Approved in *Wampler vs. Wolfinger*, 13 Md. 345. Distinguished in *Sindall vs. Campbell*, 7 Gill, 74.

they originated in a fraudulent combination to cheat creditors, were considered as void *ab initio*, and wholly wanting in legal fitness to stand as securities for any advances whatsoever. (d)

* If a man has acted fraudulently and is conscious of a defect in his title, and with that conviction on his mind expends a sum of money in improvements, he is not entitled to avail himself of it. (e) **192**

According to the course of the Court of Chancery, where the proceeds of property ordered to be sold for the payment of creditors, are insufficient to pay all, the interest is to be calculated only up to the day of sale. *Per* BLAND, Chancellor.

Where a creditor files a bill, for the purpose of subjecting the property of his debtor to the payment of his own claim, and of all others who may obtain permission to come in, and participate in the burthens and the benefits, the others are allowed to come in, at any time either before or after the decree; and it is most usual and proper, that the decree itself should command the trustee to give notice at the time of advertising the property for sale, to all creditors to bring in their vouchers. *Ib.*

When a bill is brought upon an equitable title, and there is a trust, and in the case of an infant, or where there has been any fraud, or in cases of dower, an account of the rents and profits will be ordered, and that from the time the title accrued until the defendant was put out of possession. *Ib.*

In what is commonly called a creditor's bill, and where two or more creditors bring such a bill, or others come in afterwards, the adjustment of their rights and interests in relation to each other, and the objections which the defendants may make against those who have come in after the institution of the suit, remain to be considered and decided when the Court is called on to make distribution of the fund. *Ib.*

Other creditors than the complainants in a bill may come in, and claim payment of their debt out of the proceeds of their debtor's property, although the bill itself contains no allegation that it was originated for their benefit; and the practice of this State is to allow them to come in and participate, by merely filing the vouchers of their claims with the register. *Ib.* (f)

With regard to the proof of claims brought in by other creditors, the practice is as in cases of deceased persons' estates to require no higher proof

(d) Cited in *McDowell vs. Goldsmith*, 6 Md. 340, where it was held that declarations of a grantor made, not in the presence of the grantee to the conveyancer who prepared the deed, tending to show that it was fraudulent, are admissible, as part of the *res gestae*, against the grantee in a case where the grantor's creditors seek to vacate the conveyance as fraudulent against them under the Statute of 13 Elizabeth. The case in the text is approved in *Albert vs. Winn*, 7 Gill, 482, and cited in *Waters vs. Dashiell*, 1 Md. 470.

(e) See *Quynn vs. Staines*, 3 H. & McH. 86, note; *Jones vs. Jones*, 4 Gill, 87. A claim for permanent improvements or betterments can be successfully asserted only by one who is a *bona fide* occupant or possessor. It can never be maintained by a mere *tort feisor* or *mala fide* intruder, who holds with full knowledge of his own position and of the adverse claim. *Linthicum vs. Thomas*, 59 Md. 583. Cf. *Gavin vs. Carling*, 55 Md. 530.

(f) Cited in *Ridgely vs. Bond*, 18 Md. 450. Cf. *Gibson vs. McCormick*, 10 G. & J. 65.

that such as would induce the Orphans' Court to allow the claim according to the testamentary system, when no objections are made. *Ib.* (g)

It is competent for the originally suing creditors to rely upon the Statute of Limitations, in opposition to the claims of other creditors, who have come in since the institution of the suit; but in applying the Statute of Limitations in such cases, it must be with all its saving provisos and also subject to the resuscitatory qualifications of such acknowledgments as are deemed sufficient to take a case out of the Statute. *Ib.* (h)

A creditor cannot introduce other particulars and causes of action of a different description not mentioned or alluded to in his bill, after a decree, by a mere *ex parte* petition; if he intended to have relied on them, he should have amended his bill before decree. *Ib.*

The filing of the schedule of an insolvent debtor by one claiming to be a creditor, cannot be considered as filing a voucher of his claim. *Ib.*

When a commission from the Court of Chancery to take testimony, is returned, according to the practice of this State, it is opened by the Chancellor, or the register, and objections of every kind to the evidence are taken and considered, at the hearing of the cause. *Ib.*

193 * APPEAL from the Court of Chancery. The bill in this case was filed on the 25th of February, 1817, in Baltimore County Court, by the appellees, (the complainants in that Court,) against the appellant and John Rogers, (the defendants therein;) and afterwards, under the Act of 1824, ch. 196, the proceedings were, at the instance of the complainants, transmitted to the Court of Chancery, on the 15th of June, 1825. The bill stated, that some time previous to the year 1811, John Rogers, stone mason in the City of Baltimore, entered into partnership with Robert Henderson, merchant of the said place, for the purpose of carrying on the flour and milling business, under the title of Henderson & Rogers. That Henderson & Rogers in carrying on their said business contracted considerable debts, among which was one contracted with the complainants in the purchase of wheat, which then amounted to about \$6,000. That Henderson & Rogers becoming embarrassed in their affairs, Rogers, for the purpose of preventing his private property from being made responsible for the debts of the said firm, on or about the 16th of January, 1811, assigned to Nicholas Strike, of the said city, two certain lots or parcels of ground situate in Pratt street in the said city, with their appurtenances, for the term of ninety-nine years; which assignments were exhibited marked No. 1 and 2. That the complainants have every reason to believe that there was no *bona fide* sale of the said lots by Rogers to Strike; that no consideration

(g) Approved in *Jackson vs. West*, 22 Md. 82.

(h) Cited in *Leiman's Case*, 32 Md. 244, where it was held that the property of an insolvent is vested in the trustee appointed by the Court, and that the trust thus created is an express trust for the benefit of the creditors of the insolvent, who are such at the date of his application, and that their claims, unless then barred by the Statute of Limitations, are not afterwards, during the execution of the trust, affected by the lapse of time.

passed between the said parties as for a sale of property; that if Strike paid Rogers any money, it was subsequently and by way of loan on the security of the said deeds; and that the said assignments were understood by the parties expressly to be made to avoid the payment of the creditors of Rogers, or of Henderson & Rogers. That as an evidence that the said deeds executed by Rogers to Strike were not intended to be absolute, but only intended to secure the same against the creditors of Rogers; and that the moneys paid by Strike to Rogers were paid only upon the security of the deeds, which had been previously executed, a considerable part of the said money was expended by Strike upon the said property contained in the deed marked No. 2, as an exhibit, after the execution thereof, and charged to Rogers as part of the purchase money; and that another * portion of said pretended purchase money was expended by Rogers 194 in erecting a furnace and other permanent buildings on the property contained in the deed made marked No. 1, as an exhibit. That Rogers, notwithstanding the said deeds, for two years after the dates thereof continued to receive the rents thereof, and also to pay the taxes thereon, and the ground rent which was due on the same. That Strike, not considering the deeds absolute, has often promised Rogers, to reconvey the same on the repayment of the amount paid by him on account of the execution of the said conveyances. That part of the alleged purchase money for said lots and houses was a sum of money paid by Strike to Col. Jacob Small, long after the execution of the said deeds; and even after Rogers' application for the Act of insolvency, which was in October, 1812, when Strike was appointed trustee for his creditors. That Strike, long after the date of said deeds, which is on the same day and year, drew up his account against Rogers, showing the manner in which he had expended, and Rogers received to the amount of the said nominal consideration in the said deeds mentioned, which the complainants pray Strike may be compelled to produce, by which the said mode of payment by Strike for said lots will satisfactorily appear as above stated. That Rogers, about October, 1812, in consequence of his pecuniary difficulties, applied to Baltimore County Court for the benefit of the Acts of insolvency of this State; on which occasion the said parties procured Strike to be named by the said Court trustee of the effects of Rogers, for the purpose of better concealing the above mentioned fraudulent assignments of said property by Rogers to Strike. The relief sought by the bill was, that the deeds from Rogers to Strike might be declared null and void; that the property be sold for the benefit of the creditors of Rogers, and of Henderson and Rogers; and that Strike should account for the rents and profits. The bill, after stating certain interrogatories to be answered, also prayed for general relief.

The Exhibit No. 1, is a deed from John Rogers to Nicholas Strike, dated the 16th of January, 1811, whereby, in consideration of \$500,

Rogers conveyed to Strike, and his heirs, executors, &c. all and singular that piece or parcel of ground, situate, lying and being, in Baltimore County aforesaid, and near * the said City of Baltimore, which is contained within the following metes and bounds, courses and distances, to wit: Beginning for the same, at, &c. “To have and to hold all and singular the said before described piece or parcel of ground, buildings, improvements and premises, hereby assigned, transferred and set over, or meant or intended so to be, with the rights and appurtenances thereunto belonging, to the use of the said Nicholas Strike, his heirs, executors, administrators or assigns, from henceforth, for and during all the rest, residue and remainder, of the original term therein of ninety-nine years, which is yet to come and unexpired, and fully to be complete and ended, with the said benefits of renewals of the original lease and term from time to time forever; and of purchasing the same in fee simple, or otherwise, as hereinbefore is mentioned, in as full, large, ample, and beneficial a manner, to all intents and purposes whatever, as the same could have been had, held and enjoyed, by the said John Rogers, his heirs, executors, administrators, or assigns, in anywise, under and subject, nevertheless, to the payment of the yearly rent or rents, as the case may be, and to a proportion of the fines for renewals, covenants and conditions, in and by the original indenture of lease thereof mentioned and expressed, and for and in respect of the said hereby assigned piece or parcel of ground and premises, to be paid, observed, performed and kept,” &c. There was also a covenant for further assurances, and that Rogers had done no act to incumber the premises.

The Exhibit, No. 2, was a deed from John Rogers to Nicholas Strike, dated the 16th of January, 1811, reciting an indenture of lease from Nicholas Rogers to Hiram Cochran, of the 19th of December, 1796, for the term of ninety-nine years, renewable forever, of all that lot or parcel of ground, situate, lying and being, on Pratt street, in Baltimore-Town, (now the City of Baltimore,) which is contained within the following metes and bounds, to wit: Beginning, &c. subject to the payment of the yearly rent of £12 10. That Cochran had assigned the premises to Robert Henderson, who had assigned the same to John Rogers, &c. That in consideration of the sum of \$1,900, Rogers granted and transferred to Strike the above described premises, “To have and to hold the same, and * every part and parcel thereof, unto the said Nicholas Strike, his heirs, executors, administrators and assigns, for and during the rest, residue and remainder, of the term of years therein yet to come and unexpired, by virtue of the original lease thereof, with the benefit of renewal thereof, from time to time forever, in as full, large, ample, and beneficial manner, to all intents and purposes whatsoever, as the said John Rogers might or could have held and enjoyed the same

by any ways or means whatsoever, subject nevertheless to the payment of the yearly rent or sum of twelve pounds, ten shillings current money, and performance of the covenants in the said recited indenture contained." There was also a covenant that Rogers had done no act to incumber the premises, and also for further assurances.

The answer of Strike stated, that he does not know at what time the said John Rogers, and Robert Henderson, entered into copartnership, nor how long said copartnership continued. That he hath no knowledge of any contract made between the complainants, and Henderson and Rogers, nor what sum of money was due, or is now due, by the said Henderson and Rogers, to the complainants, or if any money is due by them to the complainants. He stated, that on the 16th of January, 1811, Rogers, by his two several deeds of assignment of that date, did bargain, sell and assign, to this defendant, the two several lots and parcels of ground, therein particularly described, for the consideration money therein mentioned, which said deeds were duly executed, acknowledged and recorded, according to law, as by the said original deeds therewith filed, will more at large appear. That the said sale of the said two lots mentioned in the said deeds, was a *bona fide* sale, and that the full consideration money set forth in the said deed, was paid to John Rogers. That John Rogers and Robert Henderson, nor either of them, were not indebted to him previous to the execution of said deeds, and that the said deeds, or either of them, were not executed to him, to cover any loans of moneys due by Rogers and Henderson, or either of them, to this defendant; and that the said deeds, and lots of ground thereby conveyed, were not executed to this defendant in trust, or by way of mortgage or security, or to evade the claims of the creditors of Henderson and Rogers, or the creditors of either of them; * but this defendant saith, that he purchased the said lots of ground as aforesaid, absolutely for his own use, and paid 197 for the same out of his own moneys. That after he had purchased said lots of ground, and had obtained a conveyance for them, he improved one of the said lots, by erecting additional buildings thereon, which said improvements, were erected at his own charges; and he never did charge Rogers with the expenditure of the said buildings and improvements. That after he had obtained the said deeds, and possession of the said lots, he leased one of them for a term of years, and that the tenants did erect a furnace on one of the said lots, and that Rogers did not erect the said furnace, and it is no advantage to him, inasmuch as the tenants have a right to remove the said furnace, at the expiration of the said term. That Rogers, after the said purchase, never did receive the rents of the said property, with the consent of this defendant, nor pay taxes and ground rents, due on the said lots. He denies that he ever promised Rogers to reconvey the said property to him, upon his repaying the amount of the pur-

chase money paid by this defendant for the same. That he never paid to Colonel Jacob Small, any moneys for part of the purchase money of the said lots; but he paid the whole purchase money to Rogers. That he did make an estimate or account of sundry sums of money, showing what the said lots of ground stood him in, and he showed to Henry W. Rogers, Esq. counsel for the complainants, who called on this defendant, to inquire how this defendant held the said property, a rough paper containing such estimate of what said property and improvements cost him, but this defendant alleges, that he took no particular care of the said paper, and now cannot lay his hands upon it. That Rogers did obtain the benefit of the insolvent laws of this State; and that this defendant was appointed his trustee, for the benefit of Rogers' creditors. That he, as trustee, never did receive any property of any description belonging to the estate of Rogers. He refers to the insolvent proceedings filed by said Rogers in this Court, which will show the amount of property delivered in the schedule of Rogers for the benefit of his creditors. That Rogers did remain in one of said houses, on one of said lots, for some time after this defendant had purchased the same, as the

198 tenant of this defendant; * and he, Rogers, failing to pay the rent thereof, this defendant levied a distress for such rent in arrear, and sold the goods of Rogers, for said rent in arrear, and was paid the same by the officer who executed the said distress. He denies all fraud and combination as set forth in the bill of complaint.

The answer of Rogers stated, that he entered into partnership with Robert Henderson about the year 1807 or 1808, and that they carried on the flour and mill business until the year 1811, when they failed in consequence of the failure of certain mercantile houses which were largely indebted to them. That he had been a stonemason by trade, and at the time of entering into partnership was possessed of the two lots mentioned in the deeds mentioned in complainants' bill, and of nearly ten thousand dollars in cash, which were carried into the partnership funds. That at the time of entering into this partnership he supposed Henderson to be in flourishing circumstances, and clear of debt, but afterwards found that he was much incumbered with heavy debts contracted before the partnership was formed. That a few days after the failure of Henderson & Rogers, this defendant executed to Nicholas Strike the deeds No. 1 and No. 2, exhibited by the complainants, in order to secure the property therein contained for the benefit of the creditors of Henderson & Rogers, and of this defendant's own creditors, &c. in order to save the same from the creditors of Henderson before the partnership, and upon a special confidence and trust for these purposes, as well as to preserve the surplus, after the payment of these debts, for this defendant and his family. That this was the understanding and agreement between this defendant and Strike, who did not pay, or agree to pay, any part of the money which was the nominal consid-

eration of said deeds. That the said conveyances were not intended, or in any manner designed by the parties thereto, to operate as a sale of the property, or to become such in any event, but only as a conveyance in trust for the purposes above mentioned. That this defendant, after the failure of the house, returned to his trade, giving up all concern or attention to the winding up of the affairs of the partnership, believing that these effects and his own would probably be sufficient for the payment of the debts; but being afterwards sued and pressed * by the creditors, he was obliged in 1812 to apply for the benefit of the insolvent laws, when he obtained a release of his person, and Strike was appointed trustee for the benefit of his creditors, as being already in possession of the principal part of defendant's property. That defendant has not since prosecuted his application, in order to obtain a final discharge, being willing and desirous that all his just debts should be paid, and believing that the property was sufficient for the purpose; that in fact, the creditors are now all satisfied, as this defendant believes, except the complainants and John Okely, to whom a small balance is still due, and that the complainants received but a small payment on their debt, which amounts, as this defendant believes, to nearly \$6,000. That at the time when the deeds were made to Strike, the property conveyed by them was worth much more than the sum expressed as the consideration money in them, and that the complainants then offered to take them at the price of \$4,000; but that at present they are worth, as defendant believes, more than twice that sum. That at the time of executing the said deeds, the improvements on the lot, conveyed by deed, marked as complainants' exhibit No. 2, consisted of a good dwelling-house, in which this defendant resided, and in which he continued to reside about eighteen months after the date of said conveyance, without any contract, agreement or understanding with Strike, or any demand or suggestion of paying rent for the occupation of the premises. That the improvements on the other lot, exhibit No. 1, consisted at the time of said conveyances, of two small frame dwelling-houses, occupied by tenants, and a cooper's shop, which was then unoccupied. That this defendant continued to receive the rents from the tenants of said two houses, for his own use, for more than eighteen months after the date of said conveyances to Strike, without any hindrance, demand or molestation from Strike; and that he, this defendant, constantly paid the ground rents, taxes, and all other dues incident to ownership on Lot No. 2, during the time of his residence in the house thereon, and on No. 1, for a long space of time afterwards. That during this period, being desirous to engage in a more profitable employment, he borrowed of Strike, from time to time, about \$1,700, which he laid out in erecting a furnace * on lot No. 1, which he carried on about two years and an half, in conjunction with Henry McArdle and Patrick Coulson, to whom Strike granted a lease for ten years, at the rent of

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\$80, which was only the amount of the ground rent payable on said lot, on which, besides, were the houses above mentioned; the one renting for \$60, and the other for \$48, per annum, which rents were received by this defendant. That about the time when the defendant was engaged in erecting said furnace, he was persuaded by Strike to give up the house on lot No. 2 to him, in order to remove into one more conveniently situated for his business in the furnace, being assured by him that the rent which he should receive from Strike would be sufficient to pay the rent of the house which he might take; that he accordingly surrendered his house to Strike, who has ever since resided in it, and removed into one higher up the street; that before he left his house, being then very much embarrassed in his affairs, he was persuaded by Strike, in order to save his household goods from executions by creditors, to consent to a colorable distress for rent upon his effects, which was accordingly made, and a fictitious sale of his goods had, under a warrant of distress, Strike advancing the money to a mutual friend, one Patrick Coulson, to purchase them in for the use of this defendant, and Coulson handing back the money to Strike after the apparent sale had taken place, while the goods remained all the time in the undisturbed possession of this defendant, who sold and disposed of them afterwards, at his pleasure, without any demand or claim by either Coulson or Strike against this defendant, or each other, on account of the transaction. That after Strike took possession of the house, he made various repairs and improvements on it, and about eighteen or nineteen months afterwards, he rendered an account to this defendant, charging him with the expenses of the same, amounting to about \$500, and also with the money loaned to him for the building of the furnace, as well as certain other small sums, which he had from time to time lent to this defendant, amounting in the whole, as nearly as he can recollect, to about \$3,000; and then assured this defendant, as he had often done on other occasions, that on payment of the sums charged in this account, he would reconvey the whole property to him. That this *account, which he prays Strike may be compelled to produce, was made out in the hand-writing of Strike, but without date; and that defendant signed it, and returned it to Strike. That this defendant afterwards, although the money expended on the house by Strike was entirely unauthorized by him, got the money, and tendered the amount of the account to Strike, urging him to reconvey the property to him, and that Strike turned away without receiving the money, or making any answer, and has ever since refused to reconvey the property to this defendant, although he has been informed, that he has admitted to others that he held the same in trust for this defendant and his family, and was willing to convey it to them on payment of the sum due to him from this defendant. This defendant further states, that at the time when he executed those deeds, neither he, nor the house of Hender-

son & Rogers, owed anything to Strike; and that the said conveyances were not made in contemplation of future advances of money from Strike, although he afterwards received advances from him; but that the said conveyances were entirely voluntary, and without consideration, and for the uses and trusts above mentioned; and in order that the same may be applied to the payment of his just debts, and those of the firm, contracted after he entered the house, he consents that the said property be sold, and the proceeds applied under the direction of this Court, to the payment of his just debts, reserving the surplus to this defendant and his family, and submitting to such decree as the Court may make in the premises. The general replication was entered, and directions given for issuing commissions to take testimony, and such commissions accordingly issued. On motion of the complainants' counsel leave was given to examine John Rogers, one of the defendants, saving all exceptions. The testimony taken was very voluminous; and related to the consideration in the deeds from Rogers to Strike; the declarations of Rogers, and of Strike; the value of the property; the amount of the rents and profits, and the manner in which the distress of Rogers' property for rent was conducted, &c.

John Rogers, (one of the defendants, but whose examination as a witness was excepted to by the defendant Strike,) deposed, that he was a partner in the house of Henderson & Rogers at the
* time of their failure in 1811. That he executed the deeds **202**
to Strike, to prevent the property therein mentioned being made liable to the debts of Henderson. That there was some of the property of Henderson & Rogers, seized for the private debts of Henderson, contracted before the copartnership of Henderson & Rogers, by Charles Gwinn and others. That he did apply to Alexander Irvine and Frederick Johnson to suffer him to execute deeds to them for the same property, to prevent the property being seized for the debts of Henderson & Rogers; Mr. Irvine refused, and Mr. Johnson was in Bucks County, (Pa.) and not convenient. He did execute deeds to Johnson, but he did not come in time and never received them. That it was expressly understood between this deponent and Strike, that the deeds were executed to Strike for this deponent's own benefit, and that Strike acted as the deponent's friend, to protect the property for this deponent's use, from the debts of Henderson, contracted before the partnership of Henderson & Rogers. That there was no money paid by Strike to this deponent for said property until a considerable time after, say eleven months; the property was never sold to said Strike to be kept as his own property. That Strike did for some time after the execution of said deeds, loan occasionally sums of money to this deponent, but it was considered by this deponent, as lent money to be returned; but does not know how Strike considered it. That Strike did in presence of Strike's brother-in-law and wife, and one of his

sons, promise to convey the property to this deponent in six months or six years, upon payment of the sums he (Strike,) alleged to be borrowed from him by this deponent; and this deponent did inform Mr. Irvine of the transactions. That he remained better than eighteen months in the house in which Strike now resides, after the date of said deeds; this deponent never paid Strike rent in his life. That this deponent was induced by Strike to suffer a distress to be laid on his furniture in Strike's name, that the same might be bought in for his (Rogers') use, and prevent it being taken by his other creditors. That the said furniture was all bought by P. Coulson, for the deponent, except the candlesticks and carpet by Wolfenden, for this deponent's use; and all were sent to this deponent's house; this deponent did procure * Coulson to purchase them, by the
203 advice of Strike. That Strike did advance the money to pay for said furniture; this deponent had not at that time five dollars in the world. That the said goods were immediately carried from said dwelling-house, when sold, to the house rented by this deponent in Whiskey alley, after his removal from Pratt street. That Strike advised him to remove to Whiskey alley because the house was cheaper, and nearer his furnace and his business; and he thought it good advice at that time. That Strike, a considerable time after the date of said deeds, made out an account of the moneys borrowed by deponent from Strike since the date of said deeds, including \$500 for repairs of said house, and this deponent signed the same at his request, as an evidence that this deponent owed Strike that amount. That one of the charges in said account was \$500 for repairs to the dwelling-house in Pratt street. That this deponent received from Falls & Brown, two bonds of Dr. Harsnip and Shipley, in payment of a debt due to this deponent individually from said Dr. Falls for building a mill; and this deponent delivered said bonds to Strike, as his trustee, under the application for the Act of insolvency. That Strike did return the two bonds of Harsnip & Shipley to this deponent, upon this deponent paying Strike the money he had paid to Colonel Small. That the debt due by this deponent to Colonel Small, was for lumber to repair the dwelling-house in Pratt street, purchased before the date of said deeds to Strike; and said lumber was in the house, and at the furnace, when Strike went to reside at the house in Pratt street. That the said bonds of Harsnip & Shipley were put into the hands of J. Oakley and Wm. M'Donald, this deponent's creditors, to satisfy them part of their debts, and also a debt due Nixon Wilson. That this deponent does not know the amount due John Oakley. That this deponent was interested one-third in the lease from Strike to Coulson and M'Ardle, and Strike knew this deponent was so interested. The house in Whiskey alley was not leased with the furnace lot. That this deponent received the rents of the houses in Whiskey alley for nearly two years after the date of the deeds to Strike; he

never paid said rents to Strike, nor did Strike * ever ask deponent for them; Strike knew this deponent received said rents. **204**

He was then examined upon cross interrogatories on behalf of the defendant Strike, and answers: That there were about 2,000 bushels of wheat, and about 1,100 barrels of flour, seized by Charles Gwinn and others, for the private debts of Henderson; this was in the year 1811. That the property was conveyed to Strike for the use of this deponent and wife, and this deponent's private creditors. That he does not know how much money he received from Strike, or when, but the paper which this deponent signed for Strike is correct, except the \$500 for repairs. That the said money was received, a trifle before, and the remainder after this deponent's application for the benefit of the insolvent law; this deponent does not recollect how much money he received from Strike. It was about eighteen months after the date of the deeds to Strike, that Strike offered to reconvey said property to this deponent. That he never was to pay Strike any thing for rent of said house in Pratt street. That Strike advanced to him 300 and some odd dollars, which was paid by this deponent to Coulson, and by Coulson to Carroll the constable; the sales of said furniture were upwards of \$300; the furniture was all, except one candlestick, sent to this deponent's house in Whiskey alley; said sale was made at his house in Pratt street; the said furniture was seized by Strike under pretence of house rent due Strike, and to prevent other creditors from seizing it. A. Carroll levied said distress, and sold the property to the highest bidder at public auction; Strike was present a few minutes at the sale, and then gave this deponent the money which was paid to Carroll. He did receive back from Strike the bonds before mentioned, upon this defendant's paying Strike between fifty and sixty dollars, which Strike had paid Colonel Small; he thinks about \$800 due when Strike returned him said bonds; this deponent called a meeting of his creditors at Barney's tavern, and gave said bonds, and his gold repeating watch, to John Oakley, William M'Donald and Nixon Wilson; he received no money on said bonds, after he received them from Strike, and before he gave them to Oakley, M'Donald and Wilson. That he never did put the bonds of Harsnip and * Sutherland in the hands of Strike; he thinks Sutherland **205** was a surety on Harsnip's, but there were only two bonds which were the bonds of Harsnip and Shipley. That he pledged all his property to M'Donald, to help to carry on this law suit against Strike, and to be his friend; M'Donald promising to deliver back the property to this deponent after the suit was gained, and he (M'Donald) paid what money this deponent owes him; this deponent is to pay M'Donald whatever money he may advance on the law suit, and what this deponent owes M'Donald, if the property is recovered from Strike; that M'Donald is to be first paid, and the

balance of property to be returned to this deponent. This deponent held 400 acres in Virginia, which was willed to this deponent by F. Maguire, and he verbally conveyed his right to said land to M'Donald, until this suit be over; this deponent corrects himself by saying the land was willed to his son, John Rogers, Junior; M'Donald had lent this deponent (he thinks,) about \$400, but paid him no money on this land; this deponent verbally conveyed the said land in Virginia to M'Donald about four months ago; when this suit is ended this deponent is to receive back said land, and all his property, upon M'Donald's being satisfied. He mortgaged said land to John Brady for the purpose of finishing L. Martin's building, but returned said Brady his money, which money M'Donald gave this deponent to return to Brady. Said mortgage was executed before his verbal conveyance to M'Donald. He lent F. Maguire \$700 on Thursday evening, he died the Saturday following, and his wife took her oath before the County and Orphans' Court, that he had no friend in Baltimore but this deponent; and for the money this deponent lent Maguire, he, by his dying words, gave his land on Potomac to John Rogers, Jun'r, this deponent's son; and Priestman and Whalen and the widow, executors, made a deed for said land to John Rogers, Jr. He lent the money to Maguire he thinks about two and a half years ago. This deponent promised to put in M'Donald's hands the debts due this deponent from F. Price, L. Martin and Hugh Neilson, which debts were for work done since his application for said laws. This deponent never had a final discharge, but took a stay for his body.

206 That he owes F. Johnson * nothing, but thinks if their accounts were settled he would owe deponent something. They have never settled their accounts. This deponent was not a party in the lease from Strike to Coulson and M'Ardle; the lease was made to Coulson, M'Ardle and John Rogers, Jr. to prevent the creditors from getting at the property. That he told Strike he had received the rents for the houses in Whiskey alley. That Strike lent him no money at or before the time of the execution of the deeds; the money was lent in the years 1814 or 1815 as deponent thinks. That he promised continually to return the property to deponent, but the time before mentioned by him, was the last. That Strike had lent him nothing at the time of the execution of the deeds, but he promised deponent frequently afterwards to return him his property, upon payment of what deponent owed him. That Strike did cut down the trees in Whiskey alley, and one before the door in Pratt street; deponent complained, and Strike promised to satisfy him for the injury, if any. That M'Donald frequently told deponent that his watch was safe enough; deponent thinks that M'Donald would return it if asked, but he was never asked for it. That his son John is between fourteen and fifteen years of age. That a few days ago, on the morning of his long examination, Strike took him to the tavern at the corner of St. Paul's lane and Chatham

street, and treated him with liquor; he proposed to deponent to come before the commissioner and say that he, Strike, had lent the deponent \$3,500, and his, Strike's, house should never be shut against him, Rogers, and he would settle the balance with him at some other time. That it was the morning of his examination, and just before he delivered his testimony. That he certainly means the money which M'Donald gives to himself, or his attorneys, in carrying on the law suit, and for the support of his family. That the said sum of \$700 was part of the profits of his furnace, and not lent him by Strike. He put in \$1,880 in the concern with Coulson and M'Ardle, in the furnace built upon one of the lots now in dispute; that this was in 1814 or 1815, as he thinks; that some of this money was lent by Strike, and some received from Hugh Neilson, Ennion Williams and Frederick Price, for the work done for them, which was collected by him from the above persons in 1814 or 1815, 207
* for work done by him before that time. That he thinks he became concerned in said furnace in the year 1814 or 1815, with P. Coulson and M'Ardle; that upon reference to the lease he finds he was mistaken, and that his concern in the furnace commenced in 1812; that he does not recollect what sum of money he employed in said furnace from time to time, that he only put \$1,880 in the same concern, altogether, as his whole capital; that the concern existed eighteen months or two years. That he rented the upper rooms of the house in Pratt street to Mrs. Ramsay, after the conveyance to Strike, at five dollars per month; that he thinks Mrs. Ramsay resided about two years in the house; that he never rented any part of the house in Pratt street to any body until after the conveyance to Strike. That his son John Rogers, Jr. resides in the city of Baltimore, and never was in Virginia to deponent's knowledge. That he did not apply to Strike, or press him, to consent to withdraw the present case out of Court, and did not suppose Strike would speak to him; that he told Strike he would soon have it settled by two honest men, as the law suit was expensive to him and his children, and kept him from his trade; that he never said his lawyers were trying to get the money into their hands, and that deponent would never get any part of it.

The defendant Strike, exhibited his lease to Coulson and M'Ardle, dated the 6th of October, 1812, for a parcel of ground in Baltimore, for 10 years, at the annual rent of \$80. Also a deed from Susanna M'Guire, Jonathan Whelan and Thomas Priestman, administrators of Francis M'Guire, to John Rogers, Junior, dated the 8th of February, 1816, for 388 acres of land in Hampshire County, in the State of Virginia. Also a deed of mortgage from John Rogers, Junior, to Samuel Blair and John Brady, dated the 20th of March, 1816, of the 388 acres of land, &c. Also a deed for the same land from John Brady, the trustee in the last mentioned deed, and who had sold the premises, &c. to John Donaldson, dated the 16th of September, 1816.

Also a deed from John Donaldson to John Brady, for the same land, dated the 28th of December, 1816. Also a deed for the same land from John Brady to William M'Donald, one of the complainants, dated the 3rd of October, 1818, consideration \$253. Also a deed of mortgage from John Rogers * to William M'Donald, dated the **208** 26th of November, 1817, to secure the payment of \$700, with interest from the 1st of May, 1819. This deed was for 412 acres of land in Hampshire County, in the State of Virginia, and is stated to have been conveyed by Whelan and Priestman, administrators of M'Guire, and by Susanna, his widow, to the said Rogers. Also a deed of mortgage of the same land from John Rogers, to William M'Donald, dated the 24th of November, 1817, to secure the payment of \$300, with interest as aforesaid. Also a number of receipts given by Mrs. Rogers for rent of a part of the premises in dispute; and also receipts for ground rent, taxes, &c. paid by Strike from 1810 to 1818. Also a deed of assignment of a lease from Robert Henderson to John Rogers, dated the 30th of September, 1809, of the lot, &c. on Pratt street, in consideration of \$1,900. Also another deed of assignment of a lease from Robert Henderson to John Rogers, dated the 30th of September, 1809, for another parcel of ground in Baltimore County, and near the City of Baltimore, beginning at the distance of 90 feet E. from the N. E. corner of Pratt and Paca streets, on the N. side of Pratt street continued, running E. bounding on Pratt street continued 33 feet, then N. parallel with Paca street to Whiskey alley, &c. consideration \$500.

Strike, one of the defendants, afterwards filed another answer stating that he believes Rogers petitioned for the benefit of the insolvent laws, and filed with his petition a schedule of his property, and a list of his creditors and debtors, but for greater certainty begs leave to refer to the same of record in this Court. This defendant admits he was appointed trustee for the benefit of the creditors of Rogers, and that Rogers, in pursuance of the said insolvent laws, made and executed a deed to this defendant, which is also of record in this Court. That this defendant at the instance of Henry Rogers. Esquire, attorney at law, instituted suit in Baltimore County Court against Penelope Price, late widow of Frederick Price, one of the debtors of Rogers, the insolvent debtor aforesaid, and contained in his said schedule, the cause of action whereof had been before, as this defendant hath been informed, placed by John Rogers in the hands of the said Henry Rogers for collection. That Greetham & **209** Devereaux, other debtors of Rogers, and mentioned * in his schedule, were insolvent debtors, and evidently not solvent at the time of this defendant's appointment as trustee aforesaid. He hath no knowledge of any claims or debts due to Rogers than are contained in his said schedule, except as hereinafter mentioned, if such may or can be deemed belonging to Rogers at the time of said insolvency. That Rogers before his application for the said insolvent

laws, conveyed to the defendant, for the consideration mentioned in the deeds, the lots of ground therein mentioned; and this defendant denies that the said deeds were made to him by Rogers, in trust for Rogers' benefit, or to defraud Rogers' creditors; but this defendant saith, that he paid to Rogers the full consideration expressed in said deeds for said property. He admits that the complainants have filed their bill in equity in this Court against this defendant and Rogers, and that a commission hath issued to take evidence, and has not yet been returned; but he denies that the testimony taken under said commission does establish the fraud and want of consideration as set forth in the complainant's bill. He denies that he ever procured himself to be appointed trustee for Rogers, by fraudulent collusion, as set forth in the bill. He was appointed trustee without any solicitation on his part, and did not know of said appointment until it was made. That after he was so appointed trustee he was about to take the possession of the property mentioned in the schedule of Rogers. He found that the property being household furniture was claimed by the landlord of said house, wherein the said furniture then was, to a larger amount than the said property was worth, and that the said claim of said landlord was for house rent in arrear. That long before Rogers applied for the benefit of the said insolvent laws, he placed in this defendant's hands, then a constable of Baltimore County, for collection, two bonds of a certain Harsnip & Sutherland, the amount whereof he cannot precisely recollect, but which he believes are now in the possession of Wm. M'Donald, or the same has been collected or recovered by him. That Rogers had created liens on the said two bonds then uncollected, so held by the defendant, one in favor of William M'Mechen, Esquire, for \$120, the other in favor of Jacob Small, for \$80; and this defendant, long before his said appointment as trustee, received notice * of said liens, and was directed to hold the said sums of money for the said **210** M'Mechen and Small, by them, with Rogers' consent. That after his said appointment as trustee he received a note in writing from M'Mechen, desiring him to deliver the said bonds to Mrs. Rogers, wife of Rogers, as he had taken Rogers' note for the debt due him from Rogers; and Mrs. Rogers having paid this defendant the sum of \$80, the amount of Small's lien, he delivered up the said two bonds to Mrs. Rogers, under the impression and belief, that he, as trustee, had no right to retain the said bonds, because they were not mentioned in the schedule filed by Rogers with his petition for the benefit of the said insolvent law, and were claimed as aforesaid. That Rogers, having received the said two bonds last mentioned from his wife, as this defendant is informed and believes, deposited the same with a certain Robert R. Richardson, in pledge, or to have the same discounted. That Nixon Wilson, a creditor of Rogers, issued an attachment against Rogers to affect the said bonds in the hands of Richardson. That the said bonds were delivered to Wilson

by Richardson with the consent of Rogers. That William M'Donald afterwards applied to Wilson for said notes, which were delivered by Wilson to M'Donald who now holds the same. That he never received any part of the said two bonds, nor hath he received any money or property of any description from the estate and effects of Rogers since his appointment as trustee aforesaid, or before his said appointment as trustee, belonging or which ever belonged to Rogers' creditors which he ought to account for under his trust. He denies that he hath been guilty of any fraud or neglect as trustee of Rogers. He denies that Rogers handed to him any evidences of debts due to him, or accounts due to him, or any other property, real, personal or mixed, than is mentioned in his said schedule, nor did this defendant receive an account or voucher for the debts due Rogers mentioned in his schedule. He hath not received any of the debts due Rogers, mentioned in his schedule aforesaid. He hath no knowledge of any claims or debts due Rogers more than are contained in his said schedule, except the two last mentioned bonds, and that in the manner hereinbefore stated. He hath heard and believes that

211 Rogers was seized in fee simple of a tract of * land lying in Virginia, containing about 412 acres, which said land belonged or ought to belong to his, Rogers' creditors, as this defendant is informed, which said land Rogers hath caused to be conveyed to William M'Donald, by deed of bargain and sale, in payment of the complainant's claim, which they allege is now due from Rogers to them. A record of the discharge of John Rogers under the insolvent laws of Maryland was also exhibited.

DORSEY, C. J. of the sixth judicial district of Baltimore County Court, (28th of May, 1822, during March Term, 1822.) The said cause being ready for hearing, and having been fully argued by complainants and defendants, the bill, answers, exhibits, testimony, and all other proceedings, were by the Court read and considered; and it being fully established to the satisfaction of the Court, that the deeds of sixteenth of January, 1811, from the defendant Rogers to the defendant Strike, mentioned in the said proceedings, were executed for the purpose of defrauding the creditors of Rogers, and without *bona fide* consideration.—Decreed, that the said deeds be, and they are hereby declared null and void, as against the complainant in this cause.—Decreed also, that the property in said deeds contained be sold. That Henry W. Rogers and Samuel Moale be, and they are hereby appointed trustees for the purpose of making said sale, &c. And the trustees shall bring into this Court, the money, or securities for money, arising from said sale or sales, to be applied, under the Court's direction, after deducting the costs of this suit, and such commission to the trustees as the Court shall think proper to allow, in consideration of the skill, attention and fidelity, wherewith they shall appear to have discharged their trust. All equities

as to the distribution of the proceeds of sale, are reserved by the Court for hearing, on the trustees' report, on bringing into Court the money or securities arising on the sale.

WARD, A. J. (31st of January, 1825.) In this cause, upon motion of the complainants' solicitor, it is ordered and decreed, that it be referred to the auditor of this Court, to state an account of the sums appearing due in this cause from the defendants, or either of them, to the plaintiffs; and also to take an account from the * proofs in the cause, or such other proofs as may be required by him 212 of the rents and profits of the several premises contained in the deeds of 16th January, 1811, from the defendant Rogers to the defendant Strike; and also of the taxes and necessary repairs paid on the same by him; and also such further account as he may be directed to take by the said plaintiffs or defendants, and submit the same by report to this Court, reserving further consideration, &c.

The property was sold by the trustees, and the proceeds of sale brought into Court. The lot on Pratt street was sold to William M'Donald, one of the complainants, for \$2,600; the other lot was sold to James Lyon for \$1,350. The sales were ratified by the Court. The auditor was directed to state the account of the trustees.

The following petition of the solicitors of the complainants was exhibited by the complainants. In this case the Court has ordered that notice be given to the creditors of Rogers, to exhibit their claims in this Court for settlement. The undersigned solicitors for complainants, beg leave to state, that by an agreement made with their clients on 18th September, 1820, it was provided that they should receive as a compensation for their services, a commission of 20 per cent. on the sum recovered, deducting therefrom the sum of \$50 to each of them, respectively, paid on that day. Under this agreement they have conducted the case to a decree, and the Court will see by the voluminous record, not without great labor and difficulty in the preparation of the case, beside a very long and laborious argument, occupying more than a week of the exclusive attention of the Court. By the report of the trustee, it appears that the amount of sales is \$3,950, on which, according to the above agreement, they are entitled to the commission of 20 per cent., but as the introduction of other creditors into the case, may lead to some difficulty, they pray the Court to sanction this allowance by their order, directing the auditor to state this as one of the allowances to be made in the sale in the trustees' account.

ARCHER, C. J. on the within petition, it is this 9th day of January, 1824, ordered and directed, that the auditor, in stating the account with the trustees, allow to Henry W. Rogers and * Henry M. Murray, solicitors for complainants, the sum of 213

\$690, as complete fees for conduct of the case, subject to the usual exceptions.

On the 6th of April, 1824, the auditor made his report, stating that he has examined the proceedings in this cause, and from them has stated the claims against the late firm of Henderson and Rogers, and John Rogers, and also the within account between the estate of John Rogers, and the trustees; that from the papers in this cause, it appears that the complainants have received the sum of \$549.10, the amount of two bonds due to Rogers, but that there is no evidence to show that they are entitled to retain the same to their exclusive benefit, except the amount of \$476.13, a part thereof having been by them paid in discharge of a lien upon the said bonds, and the balance in securing the same. The auditor has therefore credited the estate with the whole sum thus received by them, with interest thereon, and has stated the sum then paid them as preferred claims, in order that they may account with the trustees for the difference in receiving their dividend. The auditor also reports, that in stating the said account, he has credited it with the proceeds of the sale; and that he has in the first instance applied the proceeds of the said estate to the allowance to the trustees, the costs in this Court, the preferred claims of the complainants before mentioned, and the allowance of their solicitors, and that he has distributed the balance *pro rata*, amongst the creditors. The auditor also reports, that in stating the said claims and accounts, he has not noticed the claims of the defendant Strike, because the whole of them appear to have proceeded from, and to have grown out of the first fraud between Strike and Rogers, and are not therefore entitled either to a preference or dividend.

The complainants excepted to the report of the auditor, 1st. Because there is no evidence sufficient in law to support the various claims stated in said account, except the complainants' claim, filed or exhibited in the cause. 2d. Because the said claims, or the greater part of them, have been paid and satisfied—your exceptants particularly charge that the following claims, reported by the auditor, have been fully satisfied, viz. &c. and others which the exceptants will be prepared to prove as this Court may direct. 3d. Because the whole of said claims * are barred by the Act of Limitations, 214 which your exceptants plead and rely on in bar of said claims. 4. Because from the laches and neglect of the several parties named in said account and report as creditors, to prosecute their several claims, they are not entitled to the aid of this Court, or to come in for a proportion of said funds; and have not applied to be let in for such distribution. 5. Because said report and account are not in conformity with the evidence in the cause, or warranted by the principles of equity, and are in other respects erroneous.

The defendant Strike, excepted to the report of the auditor.—1. Because the auditor hath not stated the claim of the said Strike,

which is filed in the said cause, and the evidence which shows the veracity of the said claim sufficiently proved therein. 2. Because the auditor in his report hath mistaken both the law and the fact relating to the said claim of the defendant Nicholas Strike.

On the 17th of May, 1825, the auditor made another report, in which he stated, that since the 13th February, 1824, when he stated an account between the estate of John Rogers and Henry W. Rogers, and Samuel Moale, Esq'rs, trustees of the said John Rogers, and made a statement of the claims against said John Rogers, (which said account and statement are filed in this Court,) the complainants in this case have filed additional claims against said Rogers, which are herewith stated. And the auditor further reports, that the claims of Hollingsworth & Worthington, and Irvine & Beatty, contained in the foregoing statement, have been withdrawn; and that, except the schedule of John Rogers, there is no proof to establish any of the claims contained therein, but the claims of the complainants and of Robert Taylor. That the claim of the said Taylor is for a judgment rendered against Robert Henderson, the former partner of Rogers, at October Term, 1812, of Baltimore County Court, on a joint action with Rogers, which said judgment was revived against Henderson, at March Term, 1821. The auditor further reports, that he has herewith made a statement of the rents received by Strike, and the sums expended in repairs done on the property in this cause mentioned, and in payment of taxes and ground rents thereon, so far as he could collect the same from the papers in the cause. And further, that although * he gave notice to the counsel of the complainants and defendants, to produce any further testimony which they might have, no additional testimony has been produced. 215

The defendant, Strike, excepted to the last mentioned report of the auditor—1st. For that the auditor hath not stated the entire claim of the said defendant, Strike, and that the said claim is not correctly stated from the evidence in the said cause.

2d. For that Strike claims the whole proceeds of the said sales of the said property mentioned in the said report, statement and proceedings. in preference to all the other claimants in the said cause, and will contend that he is so entitled.

3d. For that the said report and statement is erroneous and defective in point of law and fact; wherefore the said defendant, Strike, begs leave to except to the same, and that the said report and statement may not be confirmed by this Court, but that the same may be remanded to the said auditor, or set aside and annulled.

The complainants excepted to the said report—1st. For that the auditor hath stated the claims of Strike, one of the defendants, for materials, work and repairs made upon the dwelling-house inhabited by him, which were done for his accommodation, and not to benefit the property.

2d. For that the said expenses and repairs were incurred by Strike under deeds which have been decreed by this Court to have been obtained by Strike from Rogers, in fraud of the *bona fide* creditors of the firm of Henderson & Rogers, of which Rogers was a partner, and without consideration.

3d. For that the said auditor hath not charged Strike with the difference between the prices bid by Strike at a public sale of the said property by the trustees, and the subsequent sale of the same, he having refused to comply with his purchases.

4th. That the said auditor hath reported the claims of Strike for repairs done to said property, although Strike has refused to produce the bills of the persons who did the repairs, and has relied upon the conjectures of said persons as to their probable value after a long lapse of time.

5th. These complainants further except to the claim hitherto audited in the first report in favor of the Mechanics Bank of Baltimore, because the same is barred by the Statute of * Limitations, the said claimants having laid by, without making any demand, until these complainants, believing themselves the sole creditors, had, by their own exertions, and at their sole and great expense, succeeded in setting aside the deeds in this cause mentioned, when they have first presented their demand.

6th. For that the said report and statement is erroneous and defective in point of law and fact; wherefore the said complainants beg leave to except to the same, and pray that the report and statement may be not confirmed by this Court, but that the same may be remanded to the said auditor, or set aside and annulled.

The cause and proceedings were afterwards transmitted to the Court of Chancery under the Act of 1824, ch. 196.

The cause was then set down for argument, and was argued.

BLAND, C. (10th of April, 1826.) This case has been very elaborately argued, and is now presented to the Court for the purpose of being finally closed. It appears to have been warmly contested in every stage. It has been partly decided, but there yet remains much to be judicially considered and determined.

There is no principle in relation to the administration of justice, which it is more important to preserve, or more necessary to adhere to than, that there must somewhere be an end to litigation. A matter which has been once solemnly decided, ought not, nor cannot be reheard and readjudicated; controversy must have an end, or society could have no peace. Errors of an inferior tribunal may be corrected by a superior; and even the same Court, under certain circumstances, will correct its own mistakes by motion, petition, or bill of review. But no Court of justice can allow itself to be engaged in the endless task of weaving and unweaving; of progressing to an adjudication, and then going back to readjudicate. Hence, what-

ever has been heretofore determined in this cause must now be considered as finally settled, and in every respect unalterable, except by bill of review, appeal, or in the regular course of law. This does not seem to have been directly controverted in the argument; but the counsel differ widely as to the nature of the decree of March, 1822—and as to how far it extends over the matter of * this suit; and some arguments have been urged which, if yielded to, **217** might lead the Court unwarily to trench upon the confines of that decree.

The first inquiry, therefore is, how much of this case yet remains to be judicially passed upon. This case was originated on the equity side of Baltimore County Court, and has been removed into this Court according to the Act of Assembly authorizing such removals. It stands here now as it would have stood had it continued there, or as if it had been begun and instituted here, and these proceedings are to be so considered. They have not been affected by any mere circumstance of place or tribunal, but are here as if they had all passed under, and been sanctioned by the judicial authority of the present Chancellor, and will be so treated accordingly.

The complainants come into Court as the creditors of Henderson & Rogers, of both and each of them. These plaintiffs complain that their debt has not been paid; and they are here seeking payment. To enable this tribunal to give them the relief they ask; and which cannot be obtained without the aid of its peculiar powers; they point to certain property which they allege was once confessedly, and ought now in reality to be within their legal reach, and subject to the payment of their claim. They allege, that this property which was at one time held by, and in the name of their debtor, Rogers, has been and is now iniquitously covered up and withdrawn from their grasp, by certain deeds of conveyance made by their debtor, Rogers, to a certain Nicholas Strike; they pray that this cover, and these impediments, may be removed; that the property may be sold; that the rents and profits of it may be accounted for; and that the proceeds may be applied in satisfaction of their claim. These plaintiffs then call on Rogers and Strike, as defendants, to meet and repel these allegations if they can.

Rogers appears, and admits that he is the debtor of the plaintiffs, and admits that he conveyed the property in question to Strike, but denies that it was done with any fraudulent design; on the contrary he avers, that those conveyances to Strike were made by him in trust for, and the better to secure the payment of all his just debts. Strike comes in and boldly takes his stand in direct and total opposition to the plaintiffs. * He avers and undertakes **218** to maintain and prove, that he acquired the property in question for a full and valuable consideration, and that he has a right to claim protection here, as a fair and *bona fide* purchaser. He plants himself upon the honesty of his title, and claims nothing by his

answer which should not be conceded to a defendant who fully sustains such a defence as he has set forth.

In application to this claim and defence, proofs have been collected, and the case has been submitted to the decision of a competent tribunal, who in March, 1822, declared and decreed, that the conveyances from Rogers to Strike were “null and void as against the complainants;” that the property in question should be sold; that the proceeds be brought in “to be applied under the Court’s direction,” and concluding with a declaration, “that all equities as to the distribution of the proceeds of sale are reserved by the Court for hearing,” on their being brought in: *Jones vs. Slubey*, 5 H. & J. 383.

It is held to be a first principle, by every Court of justice, that no one can ask for its determination without showing a sufficient ground for its decision. Before a plaintiff can call for a determination in his favor, he must furnish the Court with a basis whereon to rest its judgment. In this case, the validity and sufficiency of the plaintiff’s claim, are the very foundations of the decree; without that claim having been proved or admitted, no such decree ought or could have been rightfully made. It does, therefore, necessarily and conclusively establish the plaintiff’s claim; and consequently, that claim cannot now, in this stage of this cause, be again in any manner put in controversy. This is the first point settled by this decree.

The decree then proceeds to remove obstructions, and to grant facilities. The deeds which were the impediments complained of, are declared to be null and void; or, in other words, as between the plaintiffs and defendants, they are totally annihilated. Whatever validity or operation they may be permitted to have, as between Rogers and Strike, they can have none at all “as against the complainants.” In relation to them, this property is to be dealt with as if those deeds had never existed. This is the second point settled by this decree.

219 But it would have come to a most lame and impotent * conclusion had it stopped here; therefore, after having determined that the plaintiffs had a claim, which ought to be satisfied, and that they had a right to have recourse to this property, it goes on to declare, that the property shall be sold, and the proceeds brought in to be paid over as the Court should direct. And this is the third point settled by this decree. So far then the matters in controversy between these parties have been finally closed; and this decree must be regarded, as all others of a similar nature have been, as a final decree; one in which all the material rights of the parties have been considered and adjudicated upon.

But the decree speaks of further directions, and of equities reserved; and it has omitted to say any thing of certain incidents to those rights which it had finally settled. As to all these particulars this decree yet remains to be fulfilled and executed. When a case circumstanced like this, is brought before the Court, it is spoken of

as a case for further directions; and this phrase is used in reference to all cases, where after the final decree, as in this instance, a further and eventual interposition of the Court becomes necessary, to follow out and complete the equity, the substance of which has been established by the final decree. These further directions are spoken of in this decree, and in all similar decrees of this Court, and of the English Court of Chancery; but in giving them, the Court must act consistently with itself; and in this instance, where the decree speaks of "the Court's directions," and of all equities being reserved, its phraseology must be made compatible in all its parts. The reservation of all equities must not be used to fritter away, and to abnegate the substance of any matter, which had been in a previous part of the decree carefully and solemnly decided. No directions, therefore, will or can now be given, which are incompatible with the points settled by the decree. It is now brought before the Court to be executed and completed, not in any manner to be revised or impaired. *The Santa Maria*, 10 Wheat. 442.

The decree of March, 1822, is predicated upon the existence of a debt due to the plaintiffs; but it does not specify the exact amount, nor does it say any thing of the interest thereon. Interest in equity is held to be something more than a mere incident; * it is the production, the fruit of the money due. In this case these **220** creditors may now call for directions as to these particulars. An exact estimate of their claim could not with propriety have been made until after the sale of the property decreed to be liable for its payment; because according to the course of the Court in such cases as this, where the proceeds are sufficient to pay all, the interest is to be calculated only up to the day of sale. This then is the first point left open by this decree; but it is a matter which is reducible to precision and certainty by the calculation of the auditor, to be made according to established principles, from the proofs in the cause; any further special directions in this instance, therefore, are deemed wholly unnecessary.

In this case, the bills expressly prays, that the defendants may be ordered to account for the rents and profits of the property in question. The decree has determined, that it was unlawfully detained, by declaring the deeds under which it was held, null and void. It follows therefore, as a consequence of this decision, that an account of the rents and profits should now be ordered, and that directions should be given, as to the time for which the account is to be taken, and as to the manner of taking it. This is the second point left open by this decree; and, as to which the Chancellor will now give directions.

The decree totally annuls the deeds under which Strike claims, without retaining them as a security for anything. He can now therefore, claim nothing whatever under them as against the complainants. But, if under all the circumstances of this case, apart

from those deeds, and compatibly with the matters decided by the decree, he can show any equitable claim to an allowance for improvements he put upon the property in question, while it remained in his possession or under his control, the Court may now give directions concerning such an allowance. This is the third point left open by the decree, and upon which the Chancellor will now decide.

This is one of those cases in which one creditor is allowed to file a bill for the purpose of subjecting the property of his debtor to the payment of his own claim; and of all others who may obtain permission to come in and participate in the burthens and the benefits.

221 The other creditors are allowed to come in *at any time, either before or after the decree; and it is most usual and proper that the decree itself should command the trustee to give notice, at the time of advertising the property for sale, to all creditors to bring in their claims with the vouchers. This is the fourth point which has been left open in this, as in all other decrees of the kind. The further directions as to claims which may be thus brought in, comprehends everything concerning them. As to all matters of this nature, so far as may be deemed necessary in this case, the Chancellor will now give directions.

It is said to be an established rule of the Roman law, and that of almost all modern nations, that the true proprietor shall not recover from the *bona fide* possessor, any rents and profits which have been consumed by him. But whatever fruits and profits, whether natural or industrial, such as trees standing or felled, grain growing, and the like, which remain upon the land at the time the true proprietor established his right, belong to him, and may be recovered from such possessor, as well as the land itself. Yet, as it would seem, if it can be ascertained, that the *bona fide* possessor was not merely maintained by the rents and profits, but was actually enriched by them, as by applying them to the payment of his debts, he will be held accountable to that amount to the rightful proprietor. But this general exemption is not granted to him, who, knowingly, keeps possession of another's estate, and therefore he is compellable to account for all the mesue profits he has derived from the land prior to its being recovered from him. *Prin. Eq.* 411, 420; *Just. Inst.* l. 2, tit. 1, s. 35.

According to the common law of England, the real owner may recover the rents and profits from the tenant, whether they remain upon the land or have been consumed by him or not; nor does the occupying tenant's knowing anything of his adversary's title make any difference, as to the nature and extent of his liability for rents and profits. At common law no damages were recovered in any real action; because, as it was said, until the right to the land was determined, the party could not be said to suffer any wrong. But it seems to have been considered as well established law from a very remote period, that the right to maintain an action of trespass for

the recovery of the * mesne profits, followed as a clear and necessary consequence of the party's having established his right to the land itself. And it appears to be somewhat singular, that during the period when real actions were much in use, the Legislature should have deemed it necessary to interpose, for the purpose of allowing by positive provision, the demandant in many of them to recover damages or rents and profits, and yet that those real actions so amended and improved, should have been superseded by the action of ejectment, in which as it now seems to be settled, nothing is recovered but the land, and the party is left, as at common law, to recover the mesne profits in a separate action of trespass. But the right to recover the mesne profits by way of damages in the modern action of ejectment itself, is recognized by an English statute passed in the year 1664, and the practice of so recovering them, seems to have prevailed for some time in England and also in this State. 2 *Bac. Ab.* 437; *Lewis' Lessee vs. Beale*, 1 *H. & McH.* 185; *Joan & McCubbin vs. Shield's Lessee*, 3 *H. & McH.* 7; *Gore's Lessee vs. Worthington*, *Ib.* 96; Stat. 16 & 17 Car. II, ch. 8. 222

As early as the year 1667, in a case where lands were settled for the payment of debts, the trustees were held accountable in equity for the rents and profits to the creditors for whom they were received; and in 1685, it was held by the Court of Chancery, that he who took the mesne profits by wrong, was considered as trustee for, and accountable to him who had the right; and thenceforward the Court of Chancery made all persons account for the mesne profits they had received, to such persons as had the equitable title. And it is now settled, that where there is a serious difficulty of recovering at law, fraud, concealment or the like, or where the title is merely equitable, the party may recover the rents and profits in equity. But in Chancery, as in the Courts of common law, there seems to have been always a strong disposition to keep the adjudication upon the title entirely apart from the direction as to the mesne profits. It is not improper that the final decree, settling the right to the property, should also go on and decree an account for the rents and profits, but it is usual, where the property is sold, as in this case, to leave the account of the rents and profits to be provided for in the subsequent and further directions. 1 *Bac. Ab.* 34; * 2 *Bac. Ab.* 263; *Spish vs. Foster*, 1 *Ves.* 89; *Dormer vs. Fortesque*, 3 *Atk.* 124; *Kunn. Eject.* 444. 223

Where the party has no equitable ground of relief, and is under the necessity of proceeding at law, by an action of trespass for the recovery of the mesne profits, the tenant or defendant, by pleading the Statute of Limitations, may prevent the plaintiff from carrying his claim in all cases, as far back as the commencement of his title, and the wrong he has suffered. And should he proceed in equity, if there has been a mere adverse possession without fraud or concealment, the account will be taken only from the time of filing the bill,

for it was his own fault not to have filed it sooner. But where the bill is brought upon an equitable title, and there is a trust; and in the case of an infant, or where there has been any fraud; and in cases of dower, an account of the rents and profits will be ordered, and that from the time the title accrued. *Pulteney vs. Warren*, 6 Ves. 89, 93; *Dormer vs. Fortesque*, 3 Atk. 124; *Goodtitle vs. Tombs*, 3 Wils. 121.

In an action of trespass for mesne profits, they are assessed at the discretion of the jury in damages, and therefore governed by no settled rule as to the amount. The jury may, if they think the circumstances of fraud and wrong warrant or require it, give large and vindictive damages, even as much as four times the value of the mesne profits; or, on the other hand, they may mitigate the damages down almost to nothing; and it does not appear that their unlimited discretion in this respect, has ever been materially controlled by granting new trials. The Court of Chancery is more steady in its principles, with regard to the amount of the mesne profits. If the occupant is the mere rightful holder of the property as a pledge; for example, as mortgagee who has been let in possession, he is held accountable for no more than he has actually received, what has really come into his hands, and not for the full value, or what he might have made by skilful and proper management. But where the occupant is a wrongful holder, or has obtained possession, and has held it fraudulently, or where, there being several incumbrances, the first mortgagee uses his security for the purpose of shielding the debtor from the junior mortgagees; in such cases, such a fraudulent or

224 wrongfully occupying tenant, or an * incumbrancer who makes such an ill use of his security, will be charged with the full value; that is, with such an amount of rents and profits as a skilful and diligent tenant might have made from the land.

In this case, Strike informs us in his answer, that he obtained possession of the property in question (the one lot actually, and the other legally, as the landlord of Rogers, on whose property he levied a distress for rent in arrear,) under and by virtue of the deeds from Rogers to him, on the date of them, and that he took and received the whole rents and profits. Those deeds have been declared null and void by the decree of March, 1822, as against the complainants, on the ground of fraud. It appears, then, that Strike obtained possession of the property in question, fraudulently; that he used those deeds against these creditors, and that he wrongfully held the possession, and received the whole of the rents and profits from the date of those deeds; consequently, according to the principles of equity by which this Court is governed, and I may venture to add, by the law of all civilized nations, in relation to the rents and profits, Strike must be charged with the full value of the property in question, from the date of the deeds down to the date of the sale when he was turned out of possession.

In relation to the improvements for which Strike claims an allowance; one would suppose, that in the administration of a system of jurisprudence in a civilized society, there would be no flux and reflux of the principles of justice; that a rule once found necessary could never drop into oblivion; that however it might be altered or reformed, it could never, for any length of time, be wholly forgotten, and then be called up again, and generally applied. But it would seem there is a fluctuation, perhaps indeed a mere change of fashion as to principles of law, as in everything else. It does not appear from anything I can learn, that the doctrine, in relation to an allowance to the occupying tenant for ameliorations, was ever at all, until very recently, presented to the consideration of a Court of justice in this State as a subject of controversy, and perhaps never before so urged and investigated as it has been upon this occasion. *Drury vs. Watkins*, March, 1823, (MS.); *Quynn vs. Staines*, 3 H. & McH. 128. The principles of law, in relation to * this matter, belong to our code, but until lately, they have been suffered to lay 225 unnoticed among those rarely used regulations, which are seldom examined but by the curious. In a neighboring State, so far back as the year 1643, it seems to have been deemed expedient to place upon its statute book, all the rules in relation to compensation for improvement, made upon the land by one man, the title of which was in another. 1 *Hen. Virg. Stat.* 260, 349, 443; 2 *Hen. Virg. Stat.* 96. Yet upon a recent occasion, when a judicial decision was called for upon the occupying claimants' law of Kentucky, involving matters which in a greater or less degree attracted the attention of the whole Union, it was found that those legislative provisions had disappeared from the revised statute book of that State, and it required some care to ascertain distinctly what was then its law upon the subject. *Green vs. Biddle*, 8 *Wheat.* 1, and *App. n.* 1.

It seems to be a sound and a very generally admitted principle of justice, that no man shall be allowed to enrich himself from the losses of another, or, as it is expressed in the Roman law, *nemo debet locupletari aliena jactura*. The moral force of this rule, in all cases to which it applies, and as between parties alike fair and innocent, appears to have been considered as altogether irresistible. In all cases in which the Court is called on to apply this rule, it is essential that it should most clearly and distinctly appear, that he who claims an allowance for his losses in the shape of compensation, for improvements, should be entirely and absolutely free from all blame, because equity never interferes in favor of a wrong-doer. In cases where a *bona fide* possessor of property, one who is ignorant of all the facts and circumstances relating to his adversary's title, under a confident apprehension and belief that he was himself the true owner, proceeds to make improvements, and increases the value of the subject so held, it seems to have been almost universally admitted, that an allowance for such increased value should be made,

at least to the extent of the rents and profits. According to the Roman law, such a claim for improvements may be extended to their full value, beyond the amount of their rents and profits as against the improved subject itself. *Dormer vs. Fortesque*, 3 *Atk.* 134; *Prin. Eq.* 103, 421; *Sugd.* 525; *Just. Inst.* l. 2, tit. 1, s. 29, and notes. And
226 so, too, * according to the marine law, an account for meliorations is made, if necessary, even beyond the profits; and for ascertaining the amount, the rule is to consider the *quantum* of the improved state in which the ship comes into the hands of the original proprietors, for as to that part, it is not a restitution to them, but a new acquisition. 2 *Rob.* 239; 3 *Rob.* 101; 5 *Rob.* 294. But according to the English principles of equity, if the true owner insists on an account of rents and profits, as he may, not according to the value when the purchaser entered, but according to the present value, the Court will order an allowance to be made for the repairs and improvements. *Sugd.* 525.

But where a man has acted fraudulently, and is conscious of a defect in his title, or has bought a title notoriously bad at the time of the purchase, in such a case as a *mala fide* possessor, he is permitted by no law to make any claim whatever for improvements; he must take the consequences of his own imprudence. By the Roman law it is declared, that if a man build with his own materials upon the ground of another, the edifice becomes the property of him to whom the ground belongs, because the owner of the material is understood to have made a voluntary alienation of them, if he knew he was building upon another's land; and in the English Court of Admiralty, it has been held, that if a person buys a ship, the title to which is notoriously invalid, it must be at his own peril that he proceeds to lay out money in repairing and improving her, as no allowance for ameliorations will be made in such case. *Just. Inst.* l. 2, tit. 1, s. 30; 5 *Rob.* 294.

In the argument of *Coulter's Case*, 5 *Coke*, 30, among other things, it is said, "in divers cases, one who is in of his own wrong, shall recoupe and retain, &c. He who hath a rent of £10 issuing out of certain lands, disseises the tenant of the land, in an assise brought by the disseisee, the disseisor shall recoupe the rent in the damages; so that where the mesne profits of the land in such case were of the value of £13, the disseisee shall recover but £3. The disseisor shall recoupe all in damages which he hath expended in amending of the houses." And as an authority in support of the last position, a case is cited as far back as the year 1340. This argument is adduced in
227 *tort* * could retain. The Court in their opinion held that he clearly could not, assigning the most satisfactory reasons; and they then go on to say, that "as to the case of recouper in damages in the case of rent service, charge, or seck, it was resolved, that the reason of recouper in such case is, because otherwise when the dis-

seisee re-enters, the arrearage of the rent service, charge, or seek, would be revived; and therefore to avoid circuitry of action, and *circuitus est evitandus et boni judices est lites dirimer, ne lis ex lite oriatur*, the arrearages during the disseisin shall be recouped in damages; but if the disseisor ought to have common on the land, the value of the common shall not be recouped, for by the regress of the disseisee, he should not have any arrearages or recompence for them." *Green vs. Biddle*, 8 Wheat. 81. The Court take no notice of the position advanced in the argument, that "the disseisor shall recoupe all in damages which he hath expended in amending of the houses," and assign a reason for allowing the recouper in the other instances put, that is utterly incompatible with allowing a disseisor or *mala fide* possessor, to recoupe what he had expended in mending the houses, and therefore the position cannot be admitted to be sound law, to the full extent for which it was advanced, if at all.

The term *recoupe* in the common law, signifies the keeping back or stopping something which is due, and is used for "to defalk or to discount;" of which *Coulter's Case* furnishes an illustration. It is from the common law doctrine of recouper that our legislative provisions for "pleading discount." Acts of Ass. 1654, ch. 23, and 1785, ch. 46, s. 7, and the English statutes of set-off, about half a century later, have been derived. Stat. 5 Anne, ch. 17, s. 11; 2 Geo. II, ch. 22. *Just. Inst.* l. 4, tit. 6, s. 30. They all rest upon precisely the same principles. The object is to prevent cross actions, or as the books express it, circuitry of action, to allow the opposing claims of the same parties to be settled in one action, which must otherwise necessarily give rise to two actions; but however reasonable and desirable it may be thus to put an end to two subjects of litigation in one and the same suit, yet as it appears from *Coulter's Case* no man shall be allowed to obtain this advantage by his own wrong; and therefore it is that an executor of his own wrong will not be allowed to recoupe and retain.

* Apart from the doctrine of recouper, every claim must have a fair, legal, or equitable basis, whether presented to the Court as the cause of an original action, or by way of recouper, discount or set-off. The claim for rents and profits, and the opposing claim for improvements, each of them rests upon principles of law and equity that are wholly separate and distinct. Whether or not the proprietor shall recover rents and profits must, in each case, depend upon the justice and equity with which he sustains his claim. If he has for an unreasonable time slept upon his rights, and there should appear to be any suspicious circumstances about his case, or any discoverable infirmity in it, the Court will lessen or reject the claim altogether. So on the other hand, he who presents a claim for ameliorations, must in like manner show that it is sustainable on its own independent, substantial, and fair principles of equity; as it stands exhibited before the Court, it must appear in all respects unsullied

by wrong or deception ; it must have no taint of fraud about it ; if it has it cannot be allowed.

Such claims as these for rents and profits, and for ameliorations, may very often present themselves in a Court of equity in opposition to each other ; and be set up by litigating parties by way of recouper, discount or set-off, the one against the other. But if, as in the case of an executor *de son tort*, a man shall not be permitted to take advantage of his own wrong, even so far as to place himself in a situation to recoupe a just and equitable claim, most certainly the law would not endure a wrong-doer to oppose a fair claim in any degree whatever, by one which had originated in, and was wholly founded in his own wrong. Hence it is that a *mala fide* possessor can in no case, nor under any circumstances, be allowed any thing for improvements, either beyond or even to the amount of the rents and profits. A different rule, as has been justly observed, would place it in the power of the wrongful possessor to improve the right owner out of his estate. Yet it is said that where the sums are large, the peculiar circumstances of the case may influence the Court in directing the account to be taken from the filing of the bill only, and not from the time of taking possession. *Sugd.* 526.

229 * Now how stands the case under consideration in reference to this claim for improvements ? The bill charges that Rogers conveyed the property in question to Strike for the purpose of avoiding the payment of Rogers' creditors ; Strike answers and denies the charge, and avers that the conveyances to him were absolute, fair, and for a valuable consideration, and that he is the *bona fide* purchaser and holder of the property. But the Court, by the decree of March, 1822, has declared those conveyances to be null and void as against the complainants, and directed the property to be sold for their benefit. Hence it clearly appears, that Strike now stands before this Court convicted and condemned as a fraudulent and *mala fide* purchaser and holder of the property. He, one of the very contrivers, and a party to the fraud, claims an allowance for improvements on the property so obtained and held. Such a claim, it is believed, was never sanctioned by a Court of justice in any country, or at any time. According to all law, and every principle of equity, this claim for improvements of every description, must be totally and absolutely rejected.

Strike's claim for repairs and improvements have been thus disposed of on general principles. But it is alleged he has another and special foundation for his claim for amelioration, and advances, under the concluding sentence of the decree of March, 1822. But that decree has declared the deeds from Rogers to Strike "null and void as against the complainants;" it has retained them as a security for nothing, and in no respect whatever. The several parts of that decree must be made to harmonize one with another. Those deeds which have been so totally annulled as against the complainants, cannot,

therefore, consistently with that decree, be allowed to stand as mortgages against them, to secure to Strike either the amount of the improvements, or the advances in money he has made to Rogers. Upon that ground Strike cannot stand, because it is completely covered by the decree. This being the decided opinion of the Chancellor, he might deem it unnecessary to notice that class of cases which speak of allowances for improvements and advances made by actual mortgagees, or by those *pseudo* purchasers of young heirs and others, whose conveyances are allowed by special favor to stand and be considered as of the nature * of mere mortgages. Yet from the manner in which those cases have been pressed forward, **230** some further reasons, showing why they are inapplicable to this case, may be expected.

In this case it must be distinctly and constantly recollected, that Strike now claims reimbursements for his improvements and advances, not of Rogers, but out of the proceeds of the property in question, and against the creditors of Rogers, who are here as the complainants. All those cases of mortgages and *pseudo* purchases, are governed alike by the same principles of equity. A separate examination of each of them will therefore be entirely unnecessary.

In all, the bill is brought by the grantor against the grantee, or between parties who stand precisely in the relation to each other, to redeem the mortgaged property, or to set aside a conveyance which has been improperly or fraudulently obtained. And on the case being made out by the proofs, the tribunal has uniformly answered to him who asked the relief, "you must do equity before you shall obtain equity. It is true you have been imposed upon and defrauded—but it is no less true that you have been partially and in some degree benefited; you have received money from your opponent; he has permanently enhanced the value of your estate; refund the money you have received, pay for the increased value of your estate, and it shall be restored to you; the conveyances of which you complain shall be annulled, until then they shall stand as a security for those improvements and advances." Such is the language of the Chancellor in those cases where he acts under the influence of the maxim, that he who asks equity, must do equity; and this maxim is sanctioned and illustrated by an almost endless variety of cases to be found in the books.

But the application of this maxim in these cases, and for the most part, depends not only upon the immediate relationship between the parties of grantor and grantee, but also almost always upon the vendees being brought before the Court by the vendor; that is, the contracting party injured as plaintiff, against the party injuring as defendant. A few examples will sufficiently illustrate this position: The plaintiff came to be relieved against the penalty of a bond; the ground of equity was established by the proofs, and the relief was

231 decreed, but not without * the payment of principal and interest, even although it exceeded the penalty of the bond. *Fran. Max.* 4, (note ;) 2 *Ev. Poth. Ob.* 89. But where lands were devised for the payment of debts, and there was a bond debt, the interest of which had outran the penalty, yet the creditor, on a bill filed by him, was allowed to recover no more than the penalty. In the first case the creditor was sustained by this maxim of equity—in the second, his case rested barely on his own contract. Again, the plaintiff for ninety pounds lent, fraudulently obtained a bond for eight hundred pounds, on which he obtained a judgment, and the object of the bill was to have certain lands subjected to the plaintiff's satisfaction in equity. But the Court would not give him any relief, not so much as for the principal he had really lent, and dismissed his bill. If however the defendant in this case had come in to set aside the judgment for fraud, equity would have obliged him to pay the ninety pounds really lent. This case is also illustrative of another maxim, that he who has committed iniquity, shall not have equity. *Fran. Max.* 8.

Now in order to bring these cases, and the principle they illustrate, fully to bear upon the case under consideration, it must appear, that the complainants not only claim under Rogers, but that they stand here in all respects as he would have stood; and that they ask to have these deeds vacated upon the same grounds that he could have made a similar prayer. But the case now before the Court is of a totally different nature. Rogers himself is here as a defendant, charged as a *particeps fraudis*, and relief is prayed by these complainants against him as well as against Strike. The present creditors do certainly claim this property under Rogers; and it is also true that they can only take it, subject to all fair, legal and equitable liens with which Rogers may have incumbered it, antecedent and superior to their claims. But as against Strike these plaintiffs are to be considered as purchasers of the most favored and meritorious class, holding by a prior and superior title. The improvements and the advances for the ground rent, the Pratt street assessments, and the taxes alleged to have been made and paid by Strike, give him no lien upon the property itself against the rightful owner, either

232 Rogers, these creditors, or any one * else. But if Rogers had come here to be relieved against the fraud practised on him by Strike, and to have the property restored to him, the Court would have granted him relief only upon condition of his reimbursing Strike for all his improvements and advances, because they enured to the use and benefit of Rogers. But no equitable principle of that sort can be urged against the complainants. They are here as creditors, praying to be relieved against a fraud contrived between Rogers and Strike.

But admitting all this. It is alleged, that, independently of the vacated deeds and of the decree, Strike has a claim, as a kind of salvor

of this property, which ought to be allowed. It is said he has saved it from the hands of the ground landlord, by paying the ground rent; he has saved it from the grasp of the Pratt street commissioners, by paying the assessment levied upon it; and he has saved it from the power of the State, by paying the taxes. He maintains that he has a right to assume the place and to be substituted for those claimants, and he founds this claim upon the doctrine of substitution. But Strike, as regards these complainants, was an uninvited officious *mala fide* meddler with property which he knew did not belong to him, and which he was apprised ought to be liable to the claims of Rogers' creditors. He made these advances to serve himself, not for the benefit of these complainants; and if he had an intention that these advances should enure to the personal benefit of any one, it must have been to Rogers; because it was from him he took the estate; and if the conveyances were to be annulled it was only against him he could seek reimbursement. *Prin. Eq.* 134. Strike, therefore, cannot have, against these complainants, any shadow of counter-vailing equity on which to rest his claim for these advances, out of the proceeds directed to be brought into Court.

Having discussed the liabilities and pretensions of the defendants, let us now consider the interests of the complainants among themselves. This is what is commonly called a creditors' bill; and where two or more creditors bring such a bill, or others come in afterwards, the adjustment of their rights and interests, in relation to each other, and the objections which the defendants may make against those who have come in after the * institution of the suit, most generally remain to be considered and decided when the Court is **233** called on make a distribution of the fund. The claim of the plaintiffs has, as we have seen, to a certain extent, been settled and determined by the decree of March, 1822—and therefore, their claim is not now to be reconsidered and reinvestigated.

It has been objected that the bill does not, as it ought, allege that the complainants sue as well for the benefit of other creditors, as for themselves. It is often a matter of some perplexity to determine who ought to be made parties, the rule being laid down in general terms, that all who are interested in the decree should be made parties. This decree virtually recognizes this as one of those cases in which all the other creditors of the debtor, against whom, or whose estate the suit is brought, may come in either before or after the decree, or at any time before the assets have been distributed, and claim a proportionable share of them. And supposing the bill had alleged that the originally suing creditors sued as well for others as for themselves, it is said that the right of such others to come in could not now have been questioned. In England it seems to be an established rule in cases of this kind, that the bill should distinctly allege that the complainant institutes the suit, as well for the benefit of all others who may thereafter come in, as of himself. In this

State such a *qui tam* allegation in bills of this nature is very common, and is certainly very proper and useful in apprising the Court, and all concerned, at once of the object and character, in which the suit is brought. But this is the first instance here in which such an objection to a bill of this kind has ever been made, so far as I have been able to learn. In this case it sufficiently appears from the whole proceedings, bill, answers, orders and decree, that this is a case in which other creditors may come in, and therefore in this instance, and in this stage of this case, I cannot say that this bill is erroneous and deficient for the want of such an allegation; and therefore in this case, the other creditors of Rogers may be permitted to come in and participate, notwithstanding there is no such allegation in this bill.

But it is objected, that those other creditors who, it is alleged, have actually come in to partake, have not presented * them-
234 selves in legal and proper form, that their claims have not been sufficiently authenticated and proved, and even if these objections were removed, that their claims are barred by the Statute of Limitations. These objections will be severally considered, and also the reply that such objections can only be made by the defendants, and not, as in this instance, by a creditor or co-plaintiff.

In England it is the established practice for the other creditors, who come in after the institution of the suit, to do so by bill or petition. In this State, the practice has been less formal and strict. In some cases the creditor, who wishes to come in, has filed his petition in the suit that has been instituted, concisely stating the nature of his claim, and praying to be admitted as a co-plaintiff accordingly. But in most cases the creditor has been allowed to come in and participate, merely by filing the voucher of his claim with the register. This latter mode certainly does, in many respects, save much trouble and expense, and is the preferable one, where the creditor's claim is of small amount. On advertng to the case of *Allen Quynn's Estate*, I find, that I had there recognized it as the established practice of the Court, in cases of creditors' bills. This practice will, therefore, be adhered to in future, in all such cases. *M'Mechen's Ex'rs vs. Chase's Heirs*, 1820, (MS.) Per KILTY, Chan.

With regard to the proof of claims brought in by other creditors, it has been the practice in cases of deceased person's estates, to require no higher proof than such as would induce the Orphans' Court to allow the claim according to the testamentary system, in case it were paid by the executor or administrator, and no objections were made. Because, in such cases, there being no other mode by which the real estate of a deceased person could be subjected to the payment of his debts, generally, including those due by simple contract, but by bill or petition in Chancery; and on the creditors coming here for that purpose, it being directed to be sold, (as was usually expressly declared, in the older decrees of this Court,) "for

the payment of the just claims of the creditors of the deceased in a due course of administration," are therefore, when such assets are brought in, this Court feels itself authorized and required to * act upon the same kind of proof that the Orphans' Court acts on, in case of personal assets, and to make distribution 235 upon the same degree of authenticity and proof; so that the creditor when his claim is submitted to a Court of justice, will find the same measure in one tribunal as in another, or whether he obtained payment from one fund or another; and I find this practice spoken of as far back as the year 1803, as then well established. *Sluby's Estate*, (MS.); *Fladong vs. Winter*, 19 Ves. 196; *Thompson vs. Brown*, 4 Johns. Ch. Rep. 636.

In cases of insolvency, under the Acts of Assembly which formerly referred such matters to the Chancellor, it was the practice to consider the insolvent's schedule, or his voluntary admission, as sufficient evidence of the debt; or if the insolvent was dead then such proof as was admitted to sustain claims against deceased persons' estates. But, if the insolvent denied the debt, or there was any discrepancy between his schedule or admission and the creditor's claim, then the creditor was put to full proof. 1 *Ev. Poth. Ob.* 409. But the Statute of Limitations was never considered as an objection to the payment of a claim, either in the case of a deceased persons' estate, or in the case of insolvency, unless it was specially relied upon. The case now under consideration is substantially and in truth, a case of insolvency; not, indeed, referred to the Chancellor by any special Act of Assembly, but one which has been brought here by these proceedings, and in due course of law, and, therefore, the assets now here, will be distributed upon such principles and proofs as have been applied and required in similar cases, where no objection to the claim has been made.

But, in this case, the originally suing creditors have objected, that the claims of the other creditors who have come in since the institution of the suit, are not sufficiently sustained by proof; they have also objected that those claims are barred by the Statute of Limitations; and their reliance on the Statute of Limitations, it appears, was made, and sent with the reference of the cause to the auditor. The reply to these objections, in argument, is, that they are such as can only be made by one or the other, or both of the defendants; and not by a creditor or co-plaintiff.

* The debtor or his heir, has so manifest an interest in the real estate which it is proposed, in cases of this sort, to sub- 236
ject to the payment of his debts, that there never seems to have been any difference of opinion as to his right to make such objections. Where an executor or administrator fails to make such objections or waives them; or there has been a judgment against him; still the heir or devisee may make such objections in defence of the real assets. And where the executor and some of the heirs

waive these objections; yet, any other of the heirs or devisees may alone make them in defence of the whole of the real assets, as was done in the case of *Wm. Frazier's Estate* in this Court. It seems to be conceded on all hands, that these originally suing creditors have an interest in these real assets; but yet it is urged, that they cannot make such objections as these against the claims of their fellow creditors. This matter must be determined on practice, on principle, and on authority.

The defendants or the representatives of deceased debtors are generally, from strong motives of interest, so very active in their opposition to all and each of the creditors, where opposition of any sort can be of any avail, that they rarely leave anything to be said or done by any one else; and, hence, it would seem from the practice of the Court, that they alone were the only persons who had any right to urge such objections. It is obvious, therefore, that the main current of the practice here is not likely to be very fruitful of information on this subject.

There is a class of creditors' bills common in England, but of rare occurrence here, which will cast light upon this matter. Bills are often brought there by one creditor in behalf of himself and others against executors to obtain payment, and to have the assets brought in and administered under the directions of the Court of Chancery. In such cases the executor is not bound to plead the Statute of Limitations; and if he does not, the creditors will have a decree, and be paid. But it is the constant course, in the master's office, to take the objections against other creditors, and to exclude from distribution, those, who, if legal objections are brought forward, cannot make their claims effectual. So, too, in cases of bankruptcy—if the bankrupt waives any objection, it may still be made by the * creditors; and the reason of this is, that the creditors have a direct and manifest interest in the funds, and that it should satisfy their whole claims respectively. If each of them was not permitted to make these objections, they would be left at the mercy of those, for a full defence, who, in all cases, where the fund is not more than enough to pay all the debts, have no interest to exclude any one from partaking, to their prejudice, in the distribution, however ill-founded his claim may be. And besides, such bills by creditors, and proceedings in Chancery, are only to be considered as other modes of compelling payment; and the Chancellor is understood, in the distribution, to govern himself as to legal debts by the rules of law; and as to equitable debts, by the rules of equity, regarding the claim of each creditor as a suit depending; and, hence, if the executor or bankrupt fails to object or to plead the Statute of Limitations, it may be made or relied upon by any of the creditors; and the validity of such objections will sometimes be directed to be tried in an issue at law. *Ex parte Dewdney*, 15 Ves. 497; *Civil Code Nap. Art. 2225*; *Giffard vs. Hort*, 1 Sch. & Lef. 409.

In this State, similar principles have been held and sanctioned in the case of *William Sluby's Estate*:—In that case, Chancellor HANSON observes, in speaking of the liability of the real estates of deceased persons to be sold for the payment of their debts, under the Act of 1785, ch. 72, that “no mode is prescribed by the Act for establishing the debts. It is left entirely to the Chancellor’s discretion. But, (he observes,) it is a rule to admit claims on such proof as is prescribed for, and is satisfactory to an Orphans’ Court; and even to admit claims passed against an executor or administrator by an Orphans’ Court, unless objected to by some person interested, viz. by a creditor of the deceased, or his executor or administrator; or by the guardian of the infant.” The Chancellor then goes on to speak of the manner in which such objections should be tried; and in substance declares, that he would not direct an issue at law for that purpose, but in extraordinary cases. *Purnell vs. Comegys*, 1806, *per* KILTY, C. (MS.); *Edmondson et al. vs. Frazier*, 1822, *per* JOHNSON, C. (MS.) There can be no difference, in point of equity, * between the case of a creditor’s bill against a deceased per- 238 son’s estate, and a creditor’s bill, as in this instance, against an insolvent’s estate. Therefore, upon principle and authority it is competent for these originally suing creditors to make these objections, and to rely upon the Statute of Limitations, in opposition to these claims of the other creditors who have come in since the institution of this suit. But in applying the Statute of Limitations in such cases, it must be with all its saving provisos; and also subject to the resuscitating qualifications of such acknowledgments as are deemed sufficient to take a case out of the statute; of which a statement in an insolvent’s schedule may be considered as one, where the claim and schedule agree. And the statute, as in other cases, must be allowed to commence its operation from the time the debt accrued; and to run on until the creditor came in, by filing his petition, or the voucher of his claim.

The plaintiffs, by their bill found their claim, against the defendants, upon contracts made with Henderson & Rogers; and the decree of March, 1822, recognizes and affirms their claims of that description; and the proofs derived from competent witnesses, will enable the auditor, in fulfilment of that decree, to refer to the notes and vouchers, to ascertain the amount, and to compute the interest thereon. But it would be altogether without precedent to allow a plaintiff to add to the amount, and to eke out his claim indefinitely, by introducing other particulars and causes of action of a different description, not mentioned or alluded to in the pleadings, or sanctioned by the decree, and which were only noticed in the depositions of some of the witnesses; or to bring in any additional claim by a mere *ex parte* petition, filed after the hearing and decree.

If the plaintiffs had other claims than those mentioned in the pleadings, subsisting at time of filing their bill, which might have

been included therein, they should have had their bill so amended as to have embraced them, and thereby enabled the opposite party to gainsay them if he could:—Therefore the account of the plaintiffs, with John Rogers alone, and also their claim for costs in the suit against Penelope D. Price, must both of them be rejected.

The claim of the solicitors, Murray and Rogers, which appears to
239 * have been partially sanctioned by the order of the 9th of January, 1824, may be considered as somewhat in the nature of costs; and it having been placed by the auditor's report before the party's other counsel, and all concerned, and no objection having been made, it would seem now to be proper to allow it entire; and it may be so stated by the auditor.

There is no evidence derivable from any competent source going to show that the complainants ever received the money said to be due on the bonds of a Dr. Harsnip, which were said to have been in their hands and others:—Any discount or deduction from the claim of the complainants on that account, must therefore be rejected by the auditor.

According to the established usage and practice of the Court, as has been explained, there are but two modes by which other creditors can be permitted to come in and participate, in cases of this sort; they are either by petition, or by filing the vouchers of their claims. But the filing of the schedule of an insolvent debtor, certainly cannot by any strained or liberal construction of this practice, be considered as the filing of the vouchers of the claims, of all, or any of those creditors, whose names and claims are stated thereon: and laying aside the insolvent's schedule in this case, as furnishing no evidence of the intention of any creditor therein named, to come in and make a claim for any debt, which he alleged, and was ready to prove was due him, when such schedule was filed, there are but two other creditors who have made any show of coming in as other creditors of Rogers; and they are Robert Taylor, and the firm of Hollingsworth & Worthington. Taylor has filed a mere short copy of a judgment, which he obtained in Baltimore County Court against Henderson, the partner of Rogers; and Hollingsworth & Worthington merely say, that the only demand they have now against Rogers, is for twenty dollars, lent him several years ago:—But these claims are so utterly destitute of any support by proof of any sort, that they must be rejected. There are then, in fact, no claims of any other creditors of the defendant Rogers, which the auditor can be allowed to state and report for confirmation.

Upon the principles before explained, Strike must be charged with
240 the rents and profits, or full value of the property in * question, from the date of the deeds from Rogers to him, to the day of the sale by the trustee. The amount, or what has been the full value during that time must be collected and ascertained by the auditor from the proofs in the cause; and, for the reasons already given,

Strike's claim for repairs, improvements and advances must be totally rejected.

The practice in this State is wholly unlike that of England, in relation to exceptions to witnesses. 2 *Madd. Ch.* 425. Here when the commission is returned, it is opened by the Chancellor or the register, and objections of every kind to the testimony, are taken and considered at the hearing of the cause. In this case objections have been made to the reading of the depositions of two of the witnesses, on the ground of their being interested. The proofs are all now to be sent to the auditor, upon which he is to found some of the particulars of the account he is directed to state. But he should not be suffered to make any statements derived from the testimony of incompetent witnesses or illegal evidence. Therefore these objections do not come now too late, and must be decided on for the government of the auditor.

The Chancellor considers it as sufficiently apparent upon the proceedings, without going into a statement of the case, and his reasons, that John Rogers, the defendant, is an interested witness, and therefore the whole of his testimony must be set aside and totally rejected. The reading of the deposition of Alexander Irvine, has also been objected to, on the ground of his interest. It does not however sufficiently appear, that he was a creditor of Rogers and interested at the time; and therefore the objection against his testimony must be overruled. A paper purporting to be the answer of Strike to a petition of the complainants filed in Baltimore County Court against him, has been insisted on as applicable and furnishing evidence pertinent to this case. But from its phraseology and general tenor, it is evident, that it cannot be a part of the pleadings of this suit, and without the other proceedings to which it purports to be an answer, it cannot be evidence in this cause, and must be rejected.

With these explanations, determinations and directions, the case is referred to the auditor to state an account accordingly; * and the several exceptions, as well of the plaintiffs as of the defend- **241** ants, to the auditor's statements and reports heretofore made, so far as the same are inconsistent with the determinations and directions herein before given, are overruled, and so far as they may agree therewith, are sustained.

The complainants afterwards filed a petition stating that they originally employed as their counsel in this cause *Henry M. Murray* and *Henry W. Rogers*, Esq's, and agreed with them, in case of successful termination of this cause, by a final decree against Strike in this Court, to pay them ten per cent. each, on the amount of the proceeds of the said suit, as a compensation for their services therein, subject to a deduction of whatever moneys should be paid to them by the petitioners in the meantime, on the account of this suit; and that after the interlocutory decree was obtained, said *Murray* and *Rogers* applied to Baltimore County Court to fix and allow their per

centage, on the amount then received by the sale of the property in dispute, under the said decree, made by the said Court while this suit was pending there, notwithstanding the intervention of any other creditors, which was allowed by the said Court under the impression, as the petitioners believed, both of the said Court and the said solicitors, that those gentlemen were to proceed in the said cause to a final decree as aforesaid, upon which condition alone the petitioners alleged, was the said per centage to be allowed by the agreement aforesaid. The petitioners further stated, that the said *Henry M. Murray*, Esq're, soon after the order aforesaid was passed, died without proceeding further in the said cause, after the auditor's first report therein, and the petitioners have been compelled to engage *Charles Mitchell* as their counsel, in the place of the said *Henry M. Murray*, who has attended to the same since before the auditor and in Baltimore County Court, and in this honorable Court; and the petitioners had alone borne all the expenses of the said suit, on the part of the complainants. Wherefore the petitioners prayed, that the same per centage in proportion to his services in this cause, may be allowed out of the said suit to the said *Charles Mitchell*, as was to be allowed to the said *Henry M. Murray*, Esq're, if he had

242 lived to * complete the same as aforesaid, to be fixed and ascertained by this Court, with reference to the services of the said *Charles Mitchell*, Esq're, subject to a like deduction therefrom, of the money advanced by the complainants to him during the progress of this suit, or that this Court would be pleased to prevent by any other or further order, which to this Court may seem proper, any further individual burthen of the counsel fees in this cause upon the petitioners, but that the said fund may contribute thereto, as may be reasonable and proper under the agreement aforesaid, with the said *Murray*, *Rogers* and *Mitchell*, notwithstanding the intervention of any other creditors.

BLAND, C. (17th of April, 1826.) The Chancellor has read and considered the foregoing petition. No objection was intimated to him against the claim of *Henry M. Murray* until after the argument, and the Chancellor was engaged in deliberating upon and maturing those directions with which this case has been lately sent to the auditor. The Chancellor knows of no practice of this Court, or of any analogous proceedings of the English Court, which would authorize the introduction of claims of this sort into a cause, depending or about to be finally disposed of. The claim of the solicitors *Rogers* and *Murray*, he sanctioned under all the very peculiar circumstances which belonged to it, and he considers the objections to it stated in the foregoing petition as coming now too late. The claim has been acquiesced in, and could not now be reconsidered without giving *H. M. Murray's* representatives an opportunity of being heard, which cannot now be done. The Chancellor must in all

cases leave the contracts between solicitors and suitors, relative to professional services, to be settled and decided upon in like manner as all other contracts. They cannot nor ought not to be introduced into, and blended with any pending suit. Therefore this petition must be and is hereby dismissed with costs.

The auditor of the Court of Chancery afterwards, on the 4th of May, 1826, made his report, in which he stated that he had restated the account between the estate of John Rogers and the trustees, applying therein the proceeds of sale, to the payment of the trustees' commission and expenses; the complainants' costs in Baltimore County Court, costs of this audit, and *the fees allowed to *H. W. Rogers* and *H. M. Murray*, Esq's, and the balance of **243** the said proceeds then remaining to the payment of part of the complainants' claim allowed. By this account, the complainants' claim, exclusive of the allowance to their solicitors, amount to.... \$8,657 81
 Proceeds of sale applicable to the payment thereof.... 2,750 80

Leaving a balance due the complainants of..... \$5,907 01 as of the day of the trustees' sale. He has also stated an account between Strike and the estate of John Rogers, in which he has charged Strike with the full value of the rents and profits of the property conveyed to him by Rogers, rejecting entirely Strike's claim for advances in payments of taxes, ground rents, &c. and has also charged him with interest thereon up to the day of the trustees' sale. This account makes Strike indebted in the sum of \$4,967.68 from the day of sale; an amount more than sufficient to discharge the balance of the complainants' claims unprovided for by the former account.

To this report the defendant, Strike, excepted,

1st. For, that the auditor has rejected entirely the claim of the defendant Strike.

2d. Because Strike claims the whole proceeds of the said sales of the said property, mentioned in the trustees' report, statement and proceedings, in preference to all the other claims in the said cause; and will contend that he is so entitled.

3d. Because the auditor has charged the defendant Strike with the full value of the rents and profits of the property conveyed to him by Rogers, rejecting entirely Strike's claim; and because the said rents are charged higher than is warranted in the proof of the cause.

4th. Because the auditor should have allowed the defendant Strike, his advances in payment of taxes, ground rent, and the sum assessed for the extension of Pratt street; which he has not done.

5th. Because the auditor should have allowed the defendant Strike, for all permanent and necessary improvements, laid out and expended, and created on said lots; which he has not done.

6th. Because the auditor has charged the defendant Strike, with interest on the rent and profits of said property to the day
244 * of the trustees' sale, which makes Strike indebted in the sum of \$6,559.33, with further interest on \$4,967.63, from the day of sale; which he ought not to have done.

7th. Because Strike is charged with the ground rent upon the lot on Pratt street, running to Whiskey alley; which he ought not to have been.

8th. Because in the said account and report, an allowance is made to *H. W. Rogers* and *Henry M. Murray, Esq's*, for fees; and also contains an allowance for expenses incurred by creditors at the private meetings, to consult about their private affairs.

9th. Because the said statement of account and report is erroneous in point of fact and law, and contrary to equity and right.

BLAND, C. (May 15, 1826.) "This case having been submitted upon the auditor's report, and the exceptions of Nicholas Strike thereto, without argument, the proceedings were read and considered. Wherefore, it is ordered, that the said exceptions to the said report, made and filed by the auditor on the 4th instant, are hereby overruled; that the said report and statements of the auditor, be, and they are hereby ratified and confirmed; and that the trustees apply the proceeds accordingly, with the interest that has been or may be received. And it is further ordered, that Strike, one of the said defendants, forthwith pay unto the complainants, the sum of \$5,907.01, together with interest thereon from the fourteenth day of September, in the year 1822, until paid. And it is further ordered, that the defendant, Strike, pay unto the complainants, all costs which have not been stated and included in the said report of the auditor, to be taxed by the register."

From which said order, and also from the order of the Chancellor passed in the said cause on the 10th day of April, 1826, and also from the aforesaid decree, of the said County Court, in the premises, the defendant, Strike, appealed to this Court.

The cause was argued at June Term, 1827, before BUCHANAN, C. J., EARLE and MARTIN, JJ.

Winchester, for the appellant, contended—1. That the complainants being merely simple contract creditors of Henderson
245 * and Rogers, could not file their bill in equity to set aside the deeds from Rogers to Strike, without having previously obtained a judgment at law. 2. That the deeds from Rogers to Strike were absolute, *bona fide*, and for a valuable consideration. 3. That if they are not to be considered as absolute, they are to stand as security to Strike, and he is entitled to be refunded, 1st. The amount advanced by him to Rogers, which is proved to be \$2,200, with interest. 2d. For permanent improvements on the property. 3d. For contribu-

tion paid by Strike for the opening of Pratt street—levied on the property in question under the authority of an Act of the Legislature of the State. 4th. For taxes and ground rents paid by Strike.

On the first point he cited *Colman vs. Croker*, 1 *Ves. Jr.* 160, 161; *Hendricks vs. Robinson*, 2 *Johns. Ch.* 283; *Bennett vs. Musgrove*, 2 *Ves.* 52; *Brinkerhoff vs. Brown*, 4 *Johns. Ch.* 671; *Williams vs. Brown*, *Ib.* 482; *M'Dermutt vs. Strong*, *Ib.* 687; *Hughes' Lessee vs. Howard*, 3 *H. & J.* 9.

On the third point, *Pow. on Cont.* 143, 145; *Francis' Maxims in Eq.* 1 *Max.* 1, 4; *Bill vs. Price*, 1 *Vern.* 467; *Zouch vs. Suaine*, *Ib.* 320; *Saunders vs. Glass*, 2 *Atk.* 296; * *Clarkson vs. Hanway*, 2 *P. Wms.* 203; *Barker vs. Vansommer*, 1 *Bro. Ch.* 149; *Earl of* **247**
Ardglasse vs. Muschamp, 1 *Vern.* 237; *Hawes vs. Wyatt*, 3 *Bro. Ch.* 156; *Attorney-General vs. Vigor*, 8 *Ves.* 283; *Watt vs. Grove*, 2 *Sch. & Lef.* 492; *Carew vs. Johnston*, *Ib.* 283; *Sands vs. Codwise*, 4 *Johns.* 536, 578; 1 *Ball & Beatty*, 436; *Purcell vs. M'Namara*, 14 *Ves.* 91.

H. W. Rogers, for the appellees. Can this Court travel into the decree of Baltimore County Court, and look into the merits or demerits of that decree? By the Act of 1807, ch. 151, no appeal in any case is allowed after three years have elapsed between the judgment or decree, and the time of entering the appeal. The question then is, was it a decree or not which was passed in this case by Baltimore County Court? Whether the decree was final, or only interlocutory, still the appeal should have been within three years. *Thompson vs. M'Kim*, 6 *H. & J.* 302. The decree was final as to the question of right between the parties. The deeds were declared null and void, and were set aside. It is now attempted by this appeal to open that decree, having been passed more than three years before the appeal, for the purpose of letting in a technical objection—that the complainants had not proceeded at law to recover their claim, before they resorted to a Court of equity. Captious objections will not be allowed. *Carroll vs. Norwood*, 4 *H. & McH.* 290. The defendant should have demurred to the bill, and the complainants would then have dismissed their bill, and proceeded at law. But if the decree of Baltimore County Court is open for the consideration of this Court, yet it is impossible, from the testimony, for this Court to decree otherwise than that the deeds were fraudulent, * and
therefore void. The evidence is so full and irresistible, that **248**
no other conclusion can be drawn from it. Strike's own uniform declarations are strong evidence of the fraud, and conclusive of the fact. There is no proof which can be relied on for the amount paid for the improvements made by Strike on the property. Why did he not produce the bills, receipts, &c. This he did not do, but the vague recollection of witnesses is resorted to. A fraudulent grantee must exhibit strong evidence of his claim. *Piddock vs. Brown*, 3 *P. Wms.* 288; *Vaughan vs. Lloyd*, 5 *Ves.* 48, 49.

In the case of absolute fraud, a Court of equity will grant no relief. The case of a constructive fraud is different—as usury, &c. where the complainant must do equity before he can obtain equity. So also where there has been an inadequacy of price. If Rogers was the complainant in this case against Strike, the claim of Strike would be allowed. *Sand vs. Codwise*, 4 *Johns. Rep.* 536, 555, 582, 585, 598. Necessary repairs—permanent and beneficial, may be allowed for; but here none have been proved to be made which are beneficial, but merely for Strike's own personal pride—not for convenience, but for show. *Rob. on Fraud. Convey.* 451, (note a;); *Sugd.* 525, (483); *Green vs. Winter*, 1 *Johns. Ch. Rep.* 26, 27, 39; *Moore vs. Cable*, *Ib.* 385. The deeds being void, Strike held the property in trust for the benefit of the creditors of Rogers. He had, therefore, no right to make expensive repairs, &c. on the property. He improved the property solely for the purpose of appropriating it to his own use. A deed for one purpose cannot be set up for another or different purpose. *Bridgman vs. Green*, 2 *Ves.* 627; *Watt vs. Grove*, 2 *Sch. & Lef.* 501, 502.

Mitchell, on the same side. 1. As to the form of the bill.—In *Attorney-General vs. Whorwood*, 1 *Ves.* 538, 539, the Lord Chancellor says, that the charging part of a bill is useless—the statement or interrogatory in the bill is the essential part. *Cooper's Plead.* 4, 9, 10; 2 *Madd. Ch.* 168. That which is in the knowledge of the party must be positively alleged. *Frost vs. Beekman*, 1 *Johns. Ch. Rep.* 302; 2 *Madd. Ch.* 168; *Cooper's Plead.* 5. The prayer in this bill is that
249 the property * may be sold for the benefit of the creditors of Rogers and of Rogers and Henderson. The answer of Strike denies all fraud; by which he considered it a bill charging him with fraud, and not a bill charging it as a trust. Fraud then was put in issue, although imperfectly charged in the bill. *Cooper's Plead.* 6, 7; *Whorwood vs. Simpson*, 2 *Vern.* 187; 2 *Madd. Ch.* 169.

Had the complainants a right to file their bill as simple contract creditors, or as creditors at all—whether as judgment creditors, or as partnership creditors? Their claim has been admitted by Rogers, one of the defendants. Strike, the other defendant, neither admits, nor denies.

By the Act of 1825, ch. 117, unless exceptions are taken to the report of the auditor, there can be no objection made to it in this Court. Hence there has been no exception taken to the report of the claim of the complainants, nor to their right to participate in the fund—there can, therefore, be no objection made in this Court. But it has been said that simple contract creditors cannot come into a Court of equity, unless there has been a judgment, &c. at law. This is a question of jurisdiction, and should have been raised before the defendant, Strike, submitted to the jurisdiction of the Court by his answer. *Underhill vs. Van Cortlandt*, 2 *Johns. Ch.* 369; *Livingston vs. Livingston*, 4 *Johns. Ch.* 290; *Baugh vs. Price*, 1 *Wils.*

320 ; *Rathbone vs. Warren*, 10 *Johns.* 595. Equity has concurrent jurisdiction with Courts of common law in cases of fraud. *Russell vs. Clark*, 7 *Cranch*, 89; *Taylor vs. Jones*, 2 *Atk.* 600; *Colt vs. Woolleston*, 2 *P. Wms.* 154, 156; *S. C. 2 Eq. Ca. Ab.* 482; *Stent vs. Bailis*, 2 *P. Wms.* 220; *Bayard vs. Hoffman*, 4 *Johns. Ch.* 456; 1 *Madd. Ch.* 258; *Earl of Chesterfield vs. Janssen*, 2 *Ves.* 155; *Barnsly vs. Powel*, 1 *Ves.* 289; *Wheeler vs. Bingham*, 3 *Atk.* 366; *Anonymous*, 2 *Desauss.* 304; *Sands vs. Codwise*, 4 *Johns.* 536.

An act of insolvency operates as an execution on the debtor's property, for the benefit of his creditors, from the moment the insolvent applies for the relief provided by such law. Here the insolvent debtor has executed a deed to the trustee appointed according to the insolvent laws. The complainants may therefore, call on the trustee to account for his trust, and to account for the rents and profits of the property in question. Strike, * as charged in the bill, is a fraudulent and colluding trustee. The creditors **250** are *cestuis que trust*. They must be heard in equity. *Dorant vs. Simpson*, 4 *Ves.* 664, 665; *Taylor vs. Allen*, 2 *Atk.* 213; *Newland vs. Champion*, 1 *Ves.* 105. In an Appellate Court the party will not be turned out of Court for preliminary objections. *Stewart vs. Mechanics & Farmers Bank*, 19 *Johns.* 506.

The defendant cannot take advantage of the complainants' right to sue, not having taken advantage of it in the Court below; if it were otherwise, it would be a surprise upon the complainants. There is no question as to the right of the complainants to the fund. The point, therefore, ought not to be argued, as it is unconnected with partnership assets. At law a creditor may levy his execution on the joint or separate property of the partners. In equity it is different, until the proper fund has been exhausted. But here there are no separate creditors of Rogers—none appear in the record. There can then be no contest as to the joint and separate property of Rogers. *M'Culloh vs. Dashiell's Adm'r*, 1 *H. & G.* 96. The schedule returned by Rogers under his application for relief under the insolvent laws, is no evidence that there were private or other creditors. 1 *Phill. Evid.* 51. Creditors must come in and contribute to the costs of the suit, otherwise such as do not will be excluded. Joint creditors are entitled to come in and participate in the fund *pari passu* with other creditors. *Tucker vs. Oxley*, 5 *Cranch*, 35; *Wats. on Part.* 172, 243; *Ex parte Elton*, 3 *Ves.* 238; *Harris vs. Tremheere*, 15 *Ves.* 35. As to how creditors may come in. *Brown vs. Ricketts*, 3 *Johns. Ch.* 555; *Cockburn vs. Thompson*, 16 *Ves.* 327, 328. Advantage of the Act of Limitations may be taken by one or more creditors so coming in, against the claims of any others. *Dewdney, Ex parte*, 15 *Ves.* 496.

Have the complainants established the fraud? This question has been settled by the decree of Baltimore County Court in 1822, from which decree there has been no appeal within the time pre

scribed by law. The decree was pronounced upon a final hearing, the bill, answers, &c. being submitted for that purpose. It is a final decree. 2 *Harr. Ch. Pr.* 622. An interlocutory decree does not dispose of the matters in litigation between the parties; but this decree does. The equity reserved by the decree was as to the distribution of the fund raised by a sale of the property, among the honest and *bona fide* creditors. It was not for the benefit of Strike, for he had no equity. The decree was final. *Ray vs. Law*, 3 *Cranch*, 179; 1 *Wooddison*, 232 to 240; *Thompson vs. M'Kim*, 6 *H. & J.* 328; *Slee vs. Bloom*, 20 *Johns.* 690; *M'Vickar vs. Wolcot*, 4 *Johns.* 528. It is possible that the decree might have been opened by a bill of review, but not otherwise. *Lashley vs. Hogg*, 11 *Ves.* 602; *Taylor vs. Popham*, 15 *Ves.* 76; *Charman vs. Charman*, 16 *Ves.* 115; *Waldo vs. Galey*, *Ib.* 214; 2 *Madd. Ch.* 454, 457, 459, 464, 466; *Earl of Darlington vs. Pulteney*, 3 *Ves.* 386; *Lawrence vs. Cornell*, 4 *Johns. Ch.* 545; * 1 *Madd. Ch.* 263; *Moore vs. Cable*, 1 *Johns. Ch.* 252 385; *Cootes' Law of Mortg.* 66, 127, 353, 392, 561; *Hardy vs. Reeves*, 4 *Ves.* 471. The defendant, Strike, cannot be allowed for money paid on account of the opening of Pratt street, and paid for taxes, &c. *Hardwick vs. Vernon*, 4 *Ves.* 418; *Bennett vs. Musgrove*, 2 *Ves.* 52; *How vs. Weldon*, *Ib.* 517. Strike has no right to claim for advances of money made to Rogers after the deeds, for he says in his answer that he did not so advance. He would have no right if he had advanced to come in for subsequent advances in preference to *bona fide* creditors. *Jones vs. Smith*, 2 *Ves. Jr.* 376; *Colman vs. Sarel*, 3 *Bro. Ch.* 12; *Anonymous*, 2 *Ves.* 662; *Baugh vs. Price*, 1 *Wils.* 320. There are three classes of cases where relief will be granted upon the party's doing equity, as in *How vs. Weldon*, 2 *Ves.* 517; *Taylour vs. Rochford*, *Ib.* 282; *Smith vs. Loader*, *Prec. in Ch.* 80; *Barnardiston vs. Lingwood*, 2 *Atk.* 133; *Gwynne vs. Heaton*, 1 *Bro. Ch.* 1; *Pickett vs. Loggon*, 14 *Ves.* 233; *Huguenin vs. Baseley*, *Ib.* 273; *Whorwood vs. Simpson*, 2 *Vern.* 186, 187; 1 *Madd. Ch.* 261. But where a deed is set aside for fraud, nothing passed to the grantee therein; and such a deed does not stand as a security for any thing. *Bennet vs. Musgrove*, 2 *Ves.* 52; *Sands vs. Codwise*, 4 *Johns.* 598; *Boyd vs. Dunlap*, 1 *Johns. Ch.* 482; *Sands vs. Hildreth*, 12 *Johns.* 494; *S. C.* 14 *Johns.* 497. Here Strike having no valid deed or title, the deed which he had being fraudulent, erects buildings on the property, belonging to another person—Can he claim to be paid for such buildings, either at law or in equity? He knew he was a fraudulent grantee, and that his deed was void; yet notwithstanding he chose to improve the property; and now has the impudence to ask to be reimbursed for such improvements. There are cases where a deed may be set aside on terms; and where the party may be allowed to redeem on payment of the consideration—as in *Herne vs. Meeres*, 1 *Vern.* 465; *Boyd vs. Dunlap*, 1 *Johns. Ch.* 482; *Murray vs. Riggs*, 15 *Johns.* 587; *Smith vs. Loader*, *Prec. in Ch.* 80; *Chapman vs. Tanner*, 1 *Vern.* 267. But

Strike's claim, if admissible under any aspect of the case, now comes too late. *The Santa Maria Case*, 10 *Wheat*. 431.

Magruder, on the same side, cited *Jones vs. Slubey*, 5 *H. & J.* 372; *Farrow vs. Teackle*, 4 *H. & J.* 271; *Thompson vs. Brown*, 4 *Johns. Ch.* 631; *Moore vs. White*, 4 *H. & J.* 549; *Moore vs. Cable*, 1 *Johns. Ch.* 385; *Bostock vs. Blakeney*, 2 *Bro. Ch.* 653; *Field vs. Holland*, 6 *Cranch*, 25; *Phill. Evid.* 265, 266; *Bridgman vs. Green*, 2 *Ves.* 629.

Wirt, (Attorney-General of U. S.) in reply. The decree of 1822 must be considered as justifying an appeal from it if the party choose to appeal; but the party was not bound to appeal then, but might wait the final decree to be made, before he appealed. It is a privilege given to the party to appeal or not, until a final decree is pronounced. On an appeal from a final decree, the Appellate Court goes back to all interlocutory orders or decrees which took place in the action. It is the policy of the Court to discountenance so many appeals, when one would answer every purpose. It would otherwise be making one case the mother of many appeals. *Thompson vs. M'Kim*, 6 *H. & J.* 302; *Snowden vs. Dorsey*, *Ib.* 114; *Atkinson vs. Manks*, 1 *Cowan's Rep.* 702; *Norwood vs. Norwood*, 2 *H. & J.* 241. As to what is a final decree the Court are referred to *Hind's Ch. Pr.* 429; *Aldridge vs. Giles*, 3 *Hen. & Munf.* 136; 3 *Tucker's Blk.* 423; *President, &c. of William & Mary College vs. Lee*, 2 *Hen. & Munf.* 558, (note;) *M'Call vs. Peachy*, 1 *Call's Rep.* 55; *Goodwin vs. Miller*, 2 *Munf.* 43; *Chapman vs. Armistead*, 4 *Munf.* 382; *Paynes vs. Coles*, 1 *Munf.* 373.

The complainants are simple contract creditors, who have no judgment at law, but taking the first step in a Court of equity for recovering their claim against the debtor's land. Has a Court of equity jurisdiction of the case? The cases cited on the other side are all cases of collusion, fraud, &c. It is not too late now to object to the jurisdiction of a Court of equity in this case. *Wheeler & M'Attee vs. Johnson*, decided at the present term. *Pollard vs. Patterson*, 3 *Hen. & Munf.* 67. A creditor must ascertain his claim at law before he can go into equity, if fraud stands in the way of his getting his debt paid.

* If the decree of sale be right, yet the complainants, to be entitled to equity, must do equity before they can recover their claim. In England no relief is granted where deeds are set aside, &c. unless upon the ground of replacing the party where he was before the deeds were executed; and this, too, in cases of atrocious frauds. The case of a creditor makes no distinction. These complainants could not have relief, except upon Strike being paid for all advances, improvements, &c. At law it would be different. A plaintiff having a judgment might levy an execution on the property fraudulently conveyed, and the fraudulent grantee has no redress. But in equity it is otherwise; there the claimant must do equity in order to entitle him to obtain it. There is no distinction between a

creditor complainant, and a grantor complainant, on either going into a Court of equity to have a deed set aside. The fraudulent grantee must be placed in the situation he was originally. *Watt vs. Grove*, 2 Sch. & Lef. 501; *Herne vs. Meeres*, 1 Vern. 465. It has been said that there is a distinction between an absolute and constructive fraud. In the first case the fraudulent grantee has no * relief, **258** but in the latter he is to be reimbursed for all advances, &c. Are the deeds in this case absolutely fraudulent? As to the distinction between absolute and constructive fraud, the Court are referred to *Rob. on Fraud. Convey.* 451, (and *note a.*) There is no distinction between covin and fraud; and equity never considers whether a deed be void or voidable—that is done at law. A deed cannot be set aside in part for fraud—it must be *in toto*. 1 *Madd. Ch.* 262. The meaning of this is fully explained in *Middleton vs. Lord Kenyon*, 2 *Ves. Jr.* 408; *Lawley vs. Hooper*, 3 *Atk.* 281. In general, where a deed is set aside on account of fraud, it must be on terms. 1 *Madd. Ch.* 331; *Wharton vs. May*, 5 *Ves.* 69; *Purcell vs. M'Namara*, 14 *Ves.* 106; *Pickett vs. Loggon*, *Ib.* 244. As to the extent of relief in such cases, see *Rob. on Fraud. Convey.* 526; *Sugd.* 483; *Barnewell vs. Barnewell*, 3 *Ridgw. P. C.* 61, 66.

In *Sands vs. Codwise*, 4 *Johns.* 536, 555, 585, a new equity law is established in the State of New York, different from the equity law of England. *Attorney-General vs. Vigor*, 8 *Ves.* 283.

Curia adv. vult.

EARLE, J. at this term, delivered the opinion of the Court. This cause originated on the equity side of Baltimore County Court, and was removed to the Court of Chancery, under the provisions of the Act of 1824, ch. 196, where it received a final determination. On the 28th of May, 1822, the County Court expressed an opinion, that the deeds of the 16th of January, 1811, from Rogers to Strike, mentioned in the proceedings, were executed for the purpose of defrauding the creditors of Rogers, and without *bona fide* consideration, and ordered, adjudged and decreed, that the said deeds were null and void as against the complainants; and further ordered, adjudged and decreed, that the property therein contained be sold, and that Henry W. Rogers and Samuel Moale be appointed trustees, for the purpose of making the sale. And all equities as to the distribution of the proceeds of sale, were reserved by the Court for hearing, on the trustees' report, or bringing into Court the money or securities arising on the sale. The auditor then stated an account, which was **259** excepted to by * both parties; but the exceptions were not acted upon before the case was transferred to the Court of Chancery, where it made its appearance in October, 1825. It was argued at large upon its merits at March Term, 1826, and on the 10th of April following, the Chancellor referred it to the auditor in Chancery, to state an account, having in view the explanations, determi-

nations and directions, made and given by him; and he overruled the former auditor's statements and reports, so far as the same were inconsistent with his then determinations and directions. Pursuant to these directions of the Chancellor the auditor stated and reported two accounts. One between the estate of Rogers and the trustees, and the other between Strike and the same estate. And in the last account, Strike is charged with rents and profits, to a large amount, and has received no credit or allowance for necessary and permanent improvements, taxes, ground rent, or sums assessed for the extension of Pratt street. To this report he took many exceptions, all of which the Chancellor overruled, and by his order of the 15th of May, 1826, the report and statements of the auditor were ratified and confirmed; and the trustees were directed to apply the proceeds accordingly, with the interest that had been, or might be received. And the Chancellor further ordered, that Strike pay to the complainants \$5,907.01, with interest thereon from the 14th of September, 1822, until paid, with the costs, not included in the report of the auditor, to be taxed by the register.

From these several decrees and orders Strike appealed to this Court, and they present the subjects which are now to engage our attention.

The appeal from the decision of the County Court of the 28th of May, 1822, has given rise to a point in this Court, that could not have arisen before the Chancellor. It has been made a question, whether that appeal was taken within the time prescribed by the Acts of Assembly. It was taken on the 29th of May, 1826, and when more than three years had elapsed from the time of making the decision. For Strike it was strenuously argued, that it was not a final decree, and therefore not within the operation of the Act of 1807, ch. 151; while his opponents' counsel as warmly urged it to be a final and conclusive *judgment; and that if considered a decretal order only, the appeal was equally barred by length 260 of time.

Our examination of this point has been anxious and diligent, and it has conducted us to the conclusion, that it is unnecessary to determine on the nature of the decision; for whether it is a final decree, or only a decretal order, the appeal from it appears to have come too late. If viewed as a decretal order of Baltimore County Court, it should have been appealed from within nine months from the time of making it, by the terms of the Act of 1785, ch. 72, s. 27. This Act was passed long before the enlargement of the equity jurisdiction of the County Courts; but when that jurisdiction, within the legitimate sphere of its operation, was made concurrent and co-extensive with the powers of the Court of Chancery, it necessarily took with it all the laws and regulations relating to equity matters in that high tribunal, and among others, it carried with it all the provisions of this Act of Assembly. It must then be considered on

a footing with a decretal order in the Court of Chancery, which is to be appealed from within nine months from the time of making it. This is not a permissive privilege, as was said in argument, to be exercised or not in the election of the party, and to be postponed at his pleasure until the final decree. The law is imperative, and the alleged error, if insisted on, must be appealed from within nine months from the time of making the order, and not afterwards.

The phraseology of the Act is too plain to be mistaken, and whatever inconveniences in practice our construction of it may produce, it is conceived it can be made to bear no other. With all our research we have been unable to light upon a case where our Courts have given to the Act a more convenient interpretation; and we confess we should have been much relieved, if such an adjudication could have been found to have been made by them. We would willingly have taken it for our guide, and made it the foundation of our judgment. But in the absence of an adjudged case, we feel that we are bound to construe the Act agreeably to its language; and it in terms is, that the appeal be made within nine months from the time of making the decision appealed from, and not afterwards.

261 The disposition thus made of the question on the time of the * appeal, makes it unnecessary to examine into several points discussed before us. They were suggested by the proceedings anterior to the decision of the 28th of May, 1822, and in strictness were improperly brought into the argument. Excluding them from our consideration, it only remains for us to express in general terms our entire approbation of the steps pursued by the Chancellor in the case, after it was transferred to his Court. He very properly viewed all the proceedings as having taken place in the same tribunal, and treating the decree of May, 1822, as a final decree, he went on to settle and complete what it left undetermined. The complainants' bill prayed that the defendants might be made to account for rents and profits; and on the 10th of April, 1826, he referred the case to the auditor to state an account, including rents and profits, with other matters in the cause. In this he was clearly right. The decree had established the fraudulent conduct of the defendants, and vacated the deeds from the one to the other; and surely if Strike's possession of the property conveyed commenced in fraud, his continuation of that possession partook no less of the same illicit character; and it may be well received as a settled principle of equity, that whosoever comes into the possession of an estate by fraud, must account for rents and profits, when the fraudulent conveyance is vacated and set aside.

The further directions of the Chancellor to reject from the account allowances for advances and improvements made by Strike, we think also perfectly correct. The reserved equities of the decree had no view to the interest of Strike; and the deeds having been annulled, because they originated in a fraudulent combination to cheat the

creditors of Rogers, they are to be considered void *ab initio*, and wholly wanting in legal fitness to stand as securities for any advances whatsoever. They have, in truth, no lawful existence; and to use the words of an eminent civilian, "it would be inconsistent and absurd to recognize them for any lawful purpose." The quoted passage of *Sugd.* 525, furnishes a sound practical rule for rejecting claims for improvements, where the transaction is tainted with fraud. It is expressed nearly in these words: If a man has acted fraudulently, and is conscious of a defect in his title, and with that *conviction on his mind, expends a sum of money in improve- 262 ments, he is not entitled to avail himself of it. Its just application to Strike's situation is too obvious to be enlarged upon. His deeds from Rogers were grossly fraudulent in fact, being made under corrupt motives to cheat, and his improvements were made soon after, while his conscience was broad awake to his title, and his mind probably engaged in contrivances to escape detection.

The Chancellor's last order of the 15th of May, 1826, ratified the auditor's statements and report, made in conformity to his directions, and by it Strike's numerous exceptions were properly overruled.

Decree affirmed.

SCOTT vs. BRUCE.—June, 1828.

A sheriff returned a *feri facias* "laid per schedule, and property sold to B. for \$750. Resold to H. for \$725, and sale not complied with, and of course on hand." The schedule showed a levy on several parcels of land—*Held*, (on the plaintiff's motion to quash the return,) that the officer might well return those facts, and if they were according to the truth of the case, which *prima facie* must be presumed, he was certainly justified in returning them in a special manner, instead of returning in general terms, that the property was unsold, and on hand for want of buyers. (a)

APPEAL from Charles County Court. The appellant, (the plaintiff in the Court below,) on the 10th of February, 1826, issued out of that Court a writ of *feri facias*, directed to the sheriff of the county, against the appellee, (the defendant below,) on a judgment rendered therein at March Term, 1824, for \$535.23 damages, with interest thereon, &c. and costs. At the return day of the writ, (March Term, 1826,) no return thereof was made by the sheriff. At the next term, (August, 1826,) the plaintiff moved the Court for a rule on the sheriff to return the writ. The sheriff accordingly made the following return of the writ: "Laid per schedule, and property sold to Mrs. Henrietta Bruce, for \$750. Resold to Warren Hobert for \$725, and

(a) Cited in *Hardesty vs. Wilson*, 2 Gill, 486.

sale not complied with, and of course on hand. HUGH COX, Sheriff."

263 The schedule referred to was an appraisement of sundry * parcels of land taken by the sheriff under the *fieri facias*, viz. "A parcel of land called Part of Marshall, containing 258 acres; a parcel ditto called Hamersley Meadows, containing 130 acres, and a parcel ditto called Marsh, containing 70 acres, at \$8 per acre on an average," &c. The plaintiff moved the Court that the return aforesaid might be quashed and set aside, and that the sheriff be compelled to make a proper return—1st. Because the return is argumentative and superfluous. 2d. That upon the face of the return of the sheriff, it appears that he has not executed his duty in a lawful manner. 3d. That the return, if received, will have a tendency to defeat the plaintiff's remedy against the sheriff for his improper conduct. The Court overruled the motion. From which judgment of the Court, the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, ARCHER, and DORSEY, J.

Ashton, for the appellant, cited 1 *Arch. Pr.* 289, 293.

C. Dorsey, for the appellee, referred to *Zantzinger vs. Pole*, 1 *Dall.* 419.

EARLE, J. delivered the opinion of the Court. We can perceive nothing wrong in the decision of the Court below in this case. The sheriff seized the property of the defendant under the *fieri facias* directed to him, and sold it twice, although unluckily to a person, each time, who would not, or could not comply, by paying the money bid for it. The officer might well return these facts, and if they were according to the truth of the case, which *prima facie* must be presumed, he is certainly justified in returning them in a special manner, instead of returning in general terms, that the property was unsold, and on hand, for the want of buyers. How can the plaintiff, who made this motion, be affected by this mode of return? If he wishes to proceed further, it will afford as good ground for his *venditioni exponas*, as if it had been expressed in the more general language.

A distinguished Judge in the State of Pennsylvania advised this kind of return, which would hardly have been done, if it would have endangered the plaintiff's demand * or proved in any way
264 inconvenient to him. In *Zantzinger vs. Pole*, 1 *Dall.* 419, we find Chief Justice McKean stating, that if the property is not paid for after the sale, the return should be, that "the premises were knocked down to A. B. for so much, that the said A. B. has not paid the purchase money, and that, therefore, the premises remained unsold." But there is no necessity to recur to authority in this case.

We think upon principle, the Court were right, and their judgment is therefore affirmed.

Judgment affirmed.

DIMOND'S Adm'x *vs.* BILLINGSLEA.—June, 1828.

Where D. by deed bargained and sold a tract of land to B. and covenanted to warrant and defend the same against the lawful claim of all persons, and M. the widow of one who was seized of the land before D. being entitled to dower at law, brought her action of dower against B. who confessed judgment, and then filed a bill in equity and obtained an injunction against her, which bill at the final hearing was dismissed, and M. had execution for and assignment of her dower out of the warranted premises. In an action by B. against D. on his warranty—*Held.* that under the circumstances B. was not bound to prosecute an appeal either from the legal or equitable proceedings. (a)

Where the owner of a tract of land sold it, executed a bond for conveying the same to the purchaser, received a considerable part of the purchase money, and afterwards married, then conveyed the land to the purchaser and took a mortgage of the same premises from him, to secure a balance of the purchase money then unpaid, a right to dower at law vested in his wife, though under such circumstances she would not be dowable in equity.

APPEAL from Harford County Court. This was an action of covenant, brought on the 6th of June, 1821. The declaration stated that the defendant, (whose administratrix the appellant now is,) on the 9th of November, 1815, by his deed of that date, duly executed, &c. for \$2,600, paid him by the plaintiff, (the appellee,) bargained and sold to him, the plaintiff, all that tract or parcel of land lying and being in Harford County, known by the name of Horse Range, on the north side of the head of Bush River, which is contained within the following metes and bounds, courses and distances, to wit: Beginning, &c., containing 200 acres of land more or less, together with all * and singular the buildings, &c. and all the estate, right, title and interest whatsoever of the said William Dimond, both at law and equity, of, into and out of the tract or parcel of land and premises bargained and sold, &c. To have and to hold the said tract or parcel of land so as aforesaid described called Horse Range, or by whatsoever name the same may be called, together with the buildings, &c. unto the said William Billingslea, his heirs and assigns forever, to the only proper use and benefit of the said Billingslea, his heirs and assigns; and thereby covenanted to warrant and defend the same against the lawful claims of all persons, and that the plaintiff might hold and enjoy the same. The plaintiff averred that he entered thereinto accordingly, but could not hold the same free of incumbrances; neither did the said William Dimond warrant or defend the bargained premises according to his covenant aforesaid, though requested to do it; but one Elizabeth M'Comas,

(a) Cited in *Donohue vs. Daniel*, 58 Md. 602.

then and ever since being lawfully entitled to dower therein, recovered judgment thereof, and \$72.40 costs, upon her suit against the plaintiff at Harford County Court, as a Court of common law; and also upon a bill filed in said Court as a Court of Chancery. And by force of a writ of execution issued out of said Court on said judgment, she the said Elizabeth M'Comas since entered into the premises, and evicted and expelled the said Billingslea therefrom, and holds one-third part thereof legally assigned to her for her dower, so that the said William Dimond has broken his covenant aforesaid, to the damage of the plaintiff \$2,000, and thereupon he brings his suit, &c. The defendant pleaded that he had not broken the covenant, &c. Issue joined. The death of William Dimond was suggested, and Elizabeth Dimond, his administratrix, made defendant.

At the trial in May, 1825, the plaintiff gave in evidence a deed, dated the 9th of November, 1815, executed by William Dimond of the one part, and William Billingslea of the other part, whereby, in consideration of \$2,600, the said Dimond conveyed to the said Billingslea, his heirs and assigns, all that tract or parcel of land lying in Harford County, known by the name of Horse Range, on the north side of the head of Bush River, which is contained within the following metes and * bounds, courses and distances, to wit: **266** Beginning, &c. containing 200 acres of land more or less. Together, &c. and all the estate, &c. of the said Dimond of, in, to and out of the tract or parcel of land and premises. To have and to hold the said tract or parcel of land, so as aforesaid described, called Horse Range, &c. with the buildings and appurtenances, and all and singular the premises, unto the said Billingslea, his heirs and assigns, &c. And the said Dimond for himself, his heirs, &c. doth covenant, &c. to and with the said William Billingslea, his heirs, &c. that the said Dimond and his heirs, the said tract or parcel of land and premises, and every part and parcel thereof, with the appurtenances thereunto belonging to him the said Billingslea against him the said Dimond, and his heirs, and against all and every person or persons whatsoever, claiming or to claim any right, &c. in and to the same, or any part thereof, shall and will hereafter warrant and forever defend by these presents. Another covenant for further assurances, &c. for quieting the possession of the said Billingslea, his heirs and assigns, &c. The deed was acknowledged on the 9th of November, 1815, and recorded the 2d of January, 1816. The plaintiff also gave in evidence certain records and certificates of authentication, viz. One of the records was of an action brought on the 26th of July, 1816, by Elizabeth M'Comas, against William Billingslea, claiming her dower, which belonged to her of the freehold tenements which were of N. D. M'Comas, formerly her husband. Judgment by confession in August, 1817, that the demandant recover her dower of the third part of a tract of land called Horse Range, and costs. Another of the records was proceedings on a bill filed on the 24th of

October, 1817, by William Billingslea against Elizabeth M'Comas, in which it is stated, that in 1794, N. D. M'Comas was seized of a tract of land called Horse Range, and in March, 1794, he executed a bond for conveying the said land, which he had sold to C. A. Desables, and who paid a considerable part of the purchase money to M'Comas, and gave his bond for the residue of the purchase money. That on the 18th of July, 1795, M'Comas, being in possession, executed a deed conveying the said land to Desables, at which time only £93 0 6, of the purchase money remained due, and to secure * which a mortgage was executed by Desables to M'Comas. That on **267** the 23rd of July, 1794, N. D. M'Comas married Elizabeth M'Comas, who is now his widow. That Desables sold and conveyed the land, and the title is now in Billingslea. That Elizabeth M'Comas had recovered her dower in the land, &c. Prayer for injunction against that judgment. Injunction granted, and on coming in of the answer of E. M'Comas, the injunction was dissolved. The Court, at March Term, 1821, decreed that the bill be dismissed, with costs. The other record is of a writ of *habere facias seisinam*, issued on the 30th of May, 1821, on the judgment recovered by Elizabeth M'Comas against William Billingslea, for her dower, which was assigned and delivered to her, of 68 acres by metes and bounds, &c. of the tract of land called Horse Range, &c. The plaintiff also gave in evidence the age and constitution of the tenant in dower, Elizabeth M'Comas. The defendant then prayed the Court to direct the jury, that inasmuch as the plaintiff had never prosecuted any appeal from, or writ of error on the judgment and decree aforesaid, or from either of them, the plaintiff was not entitled to recover. Which direction the Court, [HANSON and WARD, A. J.] refused to give; but were of opinion, and so directed the jury, that upon the evidence herein, if the jury believed it, the plaintiff was entitled to recover. The defendant excepted. Verdict for the plaintiff, and damages assessed to \$668.90, and judgment rendered thereon. The defendant appealed to this Court.

The cause was argued at June Term, 1827, before BUCHANAN, C. J., MARTIN, STEPHEN, and DORSEY, JJ.

Williams, (District Attorney of U. S.) for the appellant, cited *Sugd.* 149, 150; *Stow vs. Tift*, 15 *Johns.* 458; *Collins vs. Torry*, 7 *Johns.* 278; *Coles vs. Coles*, 15 *Johns.* 319; 1 *Cruise's Dig.* 155; *Humphrey vs. Phinney*, 2 *Johns.* 484; *Dorchester vs. Hasbrouck*, 11 *Johns.* 510; *Shaw vs. White*, 13 *Johns.* 179; *Dolf vs. Basset*, 15 *Johns.* 21; *Fenwick vs. Forrest*, 5 *H. & J.* 414; *Fenwick's Adm'r vs. Forrest*, 6 *H. & J.* 415.

Learned, for the appellee, cited *Brown vs. Raindle*, 3 *Ves.* 256; *Hinton vs. Hinton*, *Ambl.* 277; *S. C.* 2 *Ves.* 631; *Eq. Ca. Ab.* 217; *Hamilton vs. Mohun*, 1 *P. Wms.* 121; *Hitchcock vs. Harrington*, 6

Johns. 290; *Collins vs. Torry*, 7 *Johns.* 278; *Beall vs. Lynn*, 6 *H. & J.* 336; *Hamilton vs. Cutts*, 4 *Mass.* 349.

Williams, (District Attorney of U. S.) in reply, cited *Gittings vs. Hall*, 1 *H. & J.* 14; *Owings vs. Nicholson*, 4 *H. & J.* 66; *Greenby vs. Wilcox*, 2 *Johns.* 1; *Folliard vs. Wallace*, *Ib.* 395; *Kemp vs. Welch*, 7 *Johns.* 258; *Sedgwick vs. Hollenback*, *Ib.* 376; *Vanderkatt vs. Vanderkatt*, 11 *Johns.* 122; *Waldron vs. McCarty*, 3 *Johns.* 471; *Kortz vs. Carpenter*, 5 *Johns.* 120; *Whitbeck vs. Cook*, 15 *Johns.* 483; 4 *Stark. Ev.* 434, 435; *Vanslyck vs. Kimball*, 8 *Johns.* 198.

Curia ad vult.

STEPHEN, J. at this term, delivered the opinion of the Court. This is an action of covenant brought in Baltimore County Court by the appellee against the appellant's intestate, in which * it is
272 stated that the appellant's intestate on the 9th of November, 1815, by deed, bargained and sold to him all that tract or parcel of land lying in Harford County, known by the name of Horse Range, for the consideration therein mentioned, and in said deed covenanted to warrant and defend the same against the lawful claims of all persons, and that the plaintiff might hold and enjoy the same. The plaintiff averred that he entered thereinto accordingly, but could not hold the same free of incumbrances; neither did the vendor warrant and defend the premises according to his covenant, though requested to do it. But that one Elizabeth M'Comas, being then and even since lawfully entitled to dower, recovered judgment thereof in a suit against the appellee; and also, upon a bill filed in the Court of Harford as a Court of equity. And by force of a writ of execution issued out of said Court, on said judgment at law, the said Elizabeth M'Comas entered into the premises, and evicted the plaintiff below, (the now appellee,) therefrom, and holds one-third part thereof by legal assignment, as and for her dower. To this declaration the defendant pleaded, that he had not broken his covenant; and issue was joined between the parties. On the trial of the cause, the plaintiff gave in evidence to the jury the deed containing the covenant of warranty under which he claimed title to the property in which dower was claimed by Elizabeth M'Comas. He also gave in evidence a record of an action of dower by E. M'Comas, brought in Harford County Court against him, in which there was a confession of judgment, and an execution, by virtue of which, her dower was laid off and assigned to her by the sheriff. And he further gave in evidence the record of a suit on the equity side of Harford County Court, in which, as complainant, he prayed for, and obtained an injunction to stay proceedings on said judgment, in which suit a commission, issued to take testimony; and that, on the return of the commission, the cause was set down for final hearing, and the bill dismissed. It appeared by the proceedings on the equity side of the Court, that in 1794, N. D. M'Comas was seized of the land in

question, and in March, 1794, he executed a bond for conveying the same to a certain C. A. Desables, who paid a considerable part of the purchase money to M'Comas, and gave his bond for the residue; that on * the 18th of July, 1795, M'Comas executed a deed **273** for said land to Desables, at which time Desables executed a mortgage to M'Comas, for the residue of the purchase money; that on the 23d of July, 1794, N. D. M'Comas married Elizabeth M'Comas; that Desables sold and conveyed the land, and the title is now in Billingslea, and that Elizabeth M'Comas had recovered her dower in the land. Upon this evidence the defendant prayed the opinion of the Court, and their direction to the jury, that as the plaintiff had never prosecuted any appeal or writ of error from the judgment or decree aforesaid, or from either of them, the plaintiff is not entitled to recover. Which opinion and direction the Court refused to give; but were of opinion, and so instructed the jury, that upon the evidence, if the jury believed the same, the plaintiff was entitled to recover. Whether the Court below were correct in the opinion pronounced by them, is the question to be decided by this tribunal. It appears by the facts in the case, that at the time N. D. M'Comas executed a deed for the land to Desables, he was married to Elizabeth M'Comas, in whom a right of dower at law had unquestionably vested; for although the equitable interest was vested in Desables, by virtue of his contract of purchase and a part payment of the purchase money, still the legal title remained in N. D. M'Comas; and although the wife would not be dowable in equity, under such circumstances, the vendor, in the view of that Court, being considered a trustee of the land for the vendee, and the principle being clearly settled, that a wife is not dowable of a trust, (for which see *Sugden on Vendors*, 130;) yet the wife's right of dower clearly existed at law.

The next question is, was Billingslea bound to prosecute an appeal from the judgment at law? Under all the circumstances, we think he was not; not only because he had not the shadow of a defence at law, but because he filed his bill on the equity side of Harford County Court, where, if any where, the claim of dower could only be successfully resisted, by which Court the bill, on final hearing, was dismissed. Upon this view of the subject, this Court are of opinion that there was no error in the opinion of Baltimore County Court delivered to the jury, and that the same ought to be affirmed.

Judgment affirmed.

* NEAL'S EX'R vs. FISHER'S Adm'r.—June, 1828. **274**

In an action of *assumpsit* where the declaration contained only the money counts, under the general issue, it is no variance, for the plaintiff to give in evidence a promissory note, made payable to him, by a firm, of which the defendant was a partner.

APPEAL from Baltimore County Court. This was an action of *assumpsit* for money laid out and expended; for money had and received, and for money lent and advanced, &c. brought on the 19th of February, 1823, by the appellant, (the plaintiff in the Court below,) against the testator of the appellee, (the defendant in that Court,) The defendant pleaded, 1. *Non assumpsit*. 2. *Non assumpsit infra tres annos*; and 3. *Actio non accrevit infra tres annos*. The death of the defendant was suggested at September Term, 1824, and his executor, (the now appellee) appeared and defended the action; and a rule was laid on the plaintiff to reply to the pleas, pleaded in manner aforesaid, and the cause was continued several terms under that rule. At the trial Court, (September, 1826,) the plaintiff joined in issue to the first plea, and replied generally to the other pleas, on which issues were joined.

At the trial the plaintiff offered in evidence the following note: "Baltimore, October 20th, 1813. \$500. On demand we promise to pay Ann Mary Fisher five hundred dollars, value received, with interest. NEAL, WILLS & COLE."

The said note was admitted to be drawn and signed by one of the parties thereto; and that Neal, Wills & Cole, were booksellers and copartners, carrying on business in the City of Baltimore under the style of Neal, Wills and Cole; and that the said Neal, one of the said copartners, was the defendant's testator, against whom the original writ in this cause issued. The plaintiff further offered in evidence the following acknowledgment on the back of the said note, (which was admitted to be in the hand-writing of, and signed by Neal, the defendant's testator:) "July 1st, 1818. Paid Mrs. Fisher two hundred dollars, with interest up to this day, leaving a balance due of two hundred dollars on interest till paid. ABNER NEAL."

Also that the present plaintiff had obtained letters of administration upon the estate of Ann Mary Fisher, the person mentioned as the payee of the note and of the acknowledgment, * who departed this life some years ago; and that the partners dissolved the copartnership in the year 1817. It was admitted that Wills and Cole, two of the said copartners, are yet living. The defendant then prayed the Court to instruct the jury, that the promise proved, being a joint one, and the declaration being upon a several *assumpsit*, that the plaintiff was for such variance not entitled to recover. Which direction the Court [HANSON, A. J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, STEPHEN, and ARCHER, JJ.

Meredith and *Williams*, (District Attorney of U. S.) for the appellant, contended, 1. That the promise relied on in this case was not a joint but a several promise. 2. That even if the promise was joint,

the plaintiff below had a right to recover against one of the promissors, being sued alone, and not having pleaded in abatement. They cited *Brown vs. Warham*, 3 H. & J. 572; *Barry vs. Foyles*, 1 Peters, 316. *Gill*, for the appellee, abandoned the case.

Judgment reversed, and procedendo awarded.

HOPEWELL vs. PRICE.—June, 1828.

The Act of 1794, ch 46, was passed to remedy the inconvenience existing in the execution of writs of inquiry before the sheriff, and was never intended, nor can it be construed to give a right to an inquiry of damages, where none existed before. (a)

The common law did not give damages in replevin to a defendant; but they were allowed to certain defendants in that action, viz: avowments, or other persons making conusance, or justifying as bailiffs, for rents or services, by the Statutes, 7 Hen. VIII, ch. 4, and 21 Hen. VIII, ch. 19, which have not been extended to defendants claiming property; their remedy, where any exists, is by a suit on the replevin bond. (b)

In the cases falling within the statutes above referred to, the damages recovered, are such as are sustained before the institution of the suit.

APPEAL from Saint Mary's County Court. This was an action of replevin for a negro slave. The defendant, (the now appellant,) pleaded, 1. *Non cepit*; and 2. Property in himself. Issue was joined to the first plea, and the general replication and issue joined, to the second. A jury was sworn at the trial, * and after having retired, returned to the bar to give their verdict, when the 276 plaintiff, (the appellee,) being called, made default. The jury was discharged, and the plaintiff was nonsuited; and judgment, that the defendant have a return of said negro slave, and costs. The defendant then moved the Court to award a writ of inquiry of damages, which the Court refused. From which refusal of the Court to grant his motion, the defendant appealed to this Court.

The cause was argued before BUCHANAN, C. J., ARCHER and DORSEY, JJ.

Stonestreet, for the appellant, contended, that the Court below erred in refusing a writ of inquiry to the defendant after a nonsuit by the plaintiff in replevin. He referred to the Act of 1794, ch. 46, and insisted that in an action of replevin, as both parties are plain-

(a) The Act of 1794, c. 46, as amended by the Act of 1864, c. 175, is contained in Rev. Code, Art. 64, s. 126.

(b) Although it was held, in *Dorsey vs. Gassaway*, 2 H. & J. 347, that in an action of replevin, the jury may give such damages as they think the plaintiff is entitled to as a compensation for the injury sustained, yet in practice, when the verdict is for the plaintiff, the damages are nominal. 2 *Poe's Pldg.* s. 443.

tiffs or actors, the plaintiff, by nonsuiting his case, thereby establishes the defendant's right.

C. Dorsey, for the appellee. The Act of 1794, ch. 46, is not applicable to this case, which was an action to try the right of property, and by nonsuit, the right of the defendant is not established. The defendant's remedy was on the replevin bond. He referred to 3 *Selw. N. P.* 1043.

ARCHER, J. delivered the opinion of the Court. The question presented for the consideration of the Court in this case is, whether, upon a plea of property found for a defendant in replevin, he is entitled to an order in the nature of a writ of inquiry to assess the damages by him sustained in consequence of the loss of the possession by the execution of the writ of replevin?

The Act of Assembly of 1794, ch. 46, cited by the appellant, will be found to have no bearing favorable to the application. That statute was passed to remedy the inconveniences existing in the execution of writs of inquiry before the sheriff, and was never intended, nor can it be construed, to give a right to have an inquiry of damages where none existed before.

The common law did not give damages in replevin to a defendant; but they were allowed to certain defendants in that action, by the statutes of 7 Hen. VIII, ch. 4, and 21 Hen. VIII, ch. 19. But these statutes only gave damages to avowants, or other persons making
277 conusance, or justifying as bailiffs in replevin for * rents or services, and they have not been extended to defendants claiming property. 2 *Bac Ab. tit. Costs* (F.) 53; *Turner vs. Gallilee*, *Hard.* 153.

In the cases falling within the statutes above referred to, the damages recovered, are such as are sustained before the institution of the suit. But to allow damages in this case, would be to give them for the injury arising from the institution of the suit, and the detention of the property by the plaintiff from that time, which would be a novel proceeding, and justified by no analogy of law.

The remedy of the defendant will be found by a suit on the replevin bond executed by the plaintiff, the condition of which is sufficiently comprehensive to indemnify the defendant from any injury he may sustain by a nonsuit.

Judgment affirmed.

LAIDLER'S Adm'x *vs.* THE STATE, use of HAWKINS.—June, 1828.

In an action of debt on a bond with a collateral condition, in which there were no pleadings but the declaration, the parties filed an agreement designed to supply their place, which was so defective as to be wholly insufficient for that purpose. The jury rendered a verdict for the plaintiff, and the

County Court entered judgment in conformity. On appeal the judgment was reversed, and a *procedendo* awarded.

To sustain a judgment on such a bond, obtained on verdict, by default, on *nil dicit*, a case stated or by confession. not ascertaining the sum on payment of which the penalty of the bond is to be released, the replication must set out a cause of action: or it must appear on the roll, with sufficient certainty, by way of assignment of breaches.

Judgments not resting wholly on confession, will be reversed for want of pleading in due form.

In a suit by a creditor upon a testamentary bond, the proceedings should disclose a compliance with the Act of 1720, ch. 24. (a)

In an action upon a contract to pay in tobacco, the jury may give damages in money.

APPEAL from Charles County Court. This was an action of debt, brought the 20th of May, 1818, against Elizabeth B. Laidler, (the intestate of the now appellant,) on a bond executed to the State on the 23d of November, 1815, by her, as executrix of John Laidler, with Catherine C. Laidler and Mary Ann Laidler, as her sureties. The case was continued for several terms under a rule on the defendant to answer the declaration; and at August Term, 1819, Francis W. Hawkins, at whose instance * and for whose use the action was brought, filed in Court an account between him and John Laidler, deceased, charging him in 1805 and 1806, with the hire of a negro slave for two years, amounting to 1,924 lbs. of net tobacco, of new inspection, which he had sworn to on the 8th of May, 1816, before a justice of the peace; and also proved by a witness before another justice of the peace, on the 25th of November, 1817, that he, the witness, sometime in March, 1816, called on the executrix of J. Laidler, for payment of the account, when she observed that if he would have it proved and passed by the Orphans' Court it should be paid. Proof was also made at the same time by the said witness, that the negro slave, whose hire was charged in the account, had been hired to the deceased, who frequently said he was indebted for the hire, &c. This account was passed by the Orphans' Court. The parties entered into an agreement, which was signed by their counsel, which after stating the action, was as follows: "Debt—Performance—Replication for tobacco due from the defendant's intestate; and *insimul computasset* as administratrix, and promise by administratrix to pay. Rejoinder, *non assumpsit*, and *non assumpsit infra tres annos*. General surrejoinder, and issue." 278

At the trial, (August, Term 1819,) the plaintiff proved that the defendant's testator was indebted to Francis W. Hawkins, (at whose instance and for whose use the action was brought,) in a quantity of tobacco. And further proved that the defendant had afterwards, in

(a) Approved in *Dorsey vs. State*, 4 G. & J. 478. See Rev. Code, Art. 50, s. 176.

the year 1816, promised to pay the said tobacco debt. It was further proved in evidence that the tobacco was of a very low price at the time the debt was contracted. The defendant then prayed the Court, and their instruction to the jury, that the plaintiff, under the pleadings in the cause, could not have a verdict in tobacco; but that the same must be commuted into money. But the Court, [PLATER, A. J.] refused to give such instruction, but did instruct the jury that the plaintiff was entitled to recover tobacco, and that the jury could not commute the debt, under the pleadings in the case. The defendant excepted. Verdict for the plaintiff, and the quantity of 3,900 pounds of tobacco found to be due from the defendant's testator to the said

276 Hawkins. Judgment being * rendered on the verdict for the penalty of the bond, (the debt declared for,) to be released on payment of the said quantity of 3,900 of tobacco, with interest thereon from the 20th of August, 1819, and costs, the defendant appealed to this Court, where her death being suggested, &c. the present appellant appeared as her administratrix to prosecute the appeal.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DORSEY, JJ.

Ashton, for the appellant. There was no replication assigning breaches of the condition of the bond, nor any other assignment of breaches, in consequence of which, according to the decision in the cases of *Brent and others vs. Davis*, 10 *Wheat.* 395, and *The Corporation of Washington vs. Young*, *Ib.* 406, rendered it impossible for the Court to know what judgment should be entered.

The Court below erred in refusing to grant the prayer of the defendant below on the subject of the jury's commuting the tobacco into money, which is contrary to the decision of this Court in *Lyles vs. Lyles*, 6 *H. & J.* 273.

No counsel argued for the appellee.

280 * DORSEY, J. delivered the opinion of the Court. The judgment of the County Court must be reversed on various grounds. In the first place, the suit appears to have been brought by a creditor upon a testamentary bond, without showing any such justification for this proceeding, as is required by the Act of 1720, ch. 24.

In the next place there are no pleadings in the cause, which could warrant the Court in rendering the judgment they have given. The agreement filed, which was designed to supply the want of regular pleadings, is so informal, uncertain and defective, as to be wholly insufficient for that purpose. To sustain a judgment on a testamentary, or any other bond with a collateral condition, obtained on verdict, by default, on *nil dicit*, a case stated, or by confession, not ascertaining the sum on payment of which the penalty of the bond

is to be released, the replication must set out a cause of action; or it must appear on the roll with sufficient certainty by way of assignment of breaches. The filing the account, which is set forth in the transcript, forms no portion of the pleadings in the case; nor does it properly constitute any material part of the record. It can then furnish no aid to the equitable plaintiff, by which he can extricate himself from the incurable objection to his proceedings, which set forth, neither the nature nor amount of the claim, for the recovery of which his suit was instituted. That judgments, not resting wholly on confession, will be reversed for want of pleadings made out in due form, has been so frequently decided in this, and the former Court of Appeals, that to sustain such a position, a reference to decisions is no longer necessary.

There was error also in the opinion of the County Court instructing the jury that the plaintiff was entitled to recover tobacco, and that the jury were not at liberty to give their damages in money. For the reasons before stated, the plaintiff below could not have obtained a judgment for anything; but if the pleadings in the cause would have sustained any judgment at all, as settled by this Court in *Lyles vs. Lyle's Ex'rs*, 6 H. & J. 273, it was competent for the jury to have given their damages in money instead of tobacco.

Judgment reversed, and procedendo awarded.

* LAIDLER vs. THE STATE, use of HAWKINS.—June, 1828. 281

In an action on a testamentary bond, after the plaintiff had filed his declaration, the defendant confessed a judgment for the penalty of the bond and costs, with an agreement that the judgment should be void, on payment of 3,900 pounds of net crop tobacco, with interest until paid, and costs—*Held*, that this confession superseded the necessity of assigning breaches of the condition of the bond, and authorized a judgment for the plaintiff. (a)

Where the Court may be called on to pronounce an opinion on the plaintiff's right to recover, the intervention of a jury being necessary to assess the damages sustained, there an assignment of breaches, either in the declaration, or by way of replication, or entry on the roll, as the case may be, is necessary; but where every thing is confessed, and nothing is left for the decision of either Court or jury, the assignment of breaches in an act of supererogation.

APPEAL from the Charles County Court. Debt upon the same testamentary bond as that mentioned in the preceding case of *Laidler's Adm'x vs. The State, use of Hawkins*, (ante, 277,) brought against Catherine C. Laidler, (now appellant,) one of the sureties therein. This case, like that referred to, was continued for several terms

(a) See *Kerr vs. State*, 3 H. & J. 435, note (b).

under a rule on the defendant to plead to the declaration; and at August Term, 1819, the *cestui que use* filed the same account and proof as stated in the before mentioned case. The same agreement as to pleadings, was also entered into; and at that term, (August, 1819,) the defendant confessed judgment to the plaintiff, which was entered for the penalty of the bond, (the debt declared for,) and costs; with an agreement that the judgment should be void on payment of 3,900 pounds of net crop tobacco, with interest from the 20th of August, 1819, until paid, and costs. From which judgment the defendant appealed.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DORSEY, JJ. by

Ashton, for the appellant.

No counsel argued for the appellee.

DORSEY, J. delivered the opinion of the Court. This case, although upon the same bond and with the same pleadings, as the case of *Laidler's Adm'x vs. The State, use of Hawkins*, * decided **282** by this Court at the present term, (*ante*, 277,) must receive a different determination. There the judgment was rendered below, upon trial and verdict, without any admissions or consent of the defendant. Here the judgment was rendered by the County Court, on the defendant's confession, that the plaintiff had a right to recover; thereby admitting of record the compliance with the pre-requisites of the Act of 1720, ch. 24. And the confession also ascertains the precise sum, on payment of which the penalty recovered was to be released. This confession withdraws the plea of general performance, and admits everything which the plaintiff desires to establish, or could be required to bring to issue by regular pleadings. Could it then be necessary—is it consistent with any rule of pleading, that the plaintiff should file a replication, the statements in which, are neither an answer to, nor a denial or avoidance of, any of the matters alleged by the defendant? Where the Court may be called on to pronounce an opinion on the plaintiff's right to recover, where the intervention of a jury is necessary to assess the damages sustained, there an assignment of breaches, either in the declaration, or by way of replication, or entry on the roll, as the case may be, is indispensably necessary. But where everything is confessed, where nothing is left for the decision of either Court or jury, the assignment of breaches is an act of supererogation. And such is the effect of the decision of this Court in the case of *M'Mechen vs. The Mayor, &c. of Baltimore*, 2 H. & J. 41, where, in an action upon an auctioneer's bond, the defendant pleaded general performance, but afterwards withdrew his plea and confessed judgment—On an appeal to this Court, where one of the errors assigned was the want

of a replication assigning breaches, the Court affirmed the judgment.

The question as to the insufficiency of the pleadings, subsequent to the declaration, does not arise in this case, as the judgment was not rendered upon them, but upon the defendant's confession.

Judgment affirmed.

Though regularly a sheriff in taking goods under a writ of replevin, should summon the defendant according to the mandate of the writ, yet if he neglects to do so, and the defendant voluntarily appears in Court, and defends the suit, the omission by the sheriff to summon him is thereby cured.

So where to a writ of replevin, the sheriff made no return, and an *alias* writ was issued, to which the sheriff made a return "*Eloigned*," and the plaintiff then sued out a *capias in withernam*, to which the sheriff returned, "replevied and delivered, as per schedule," and the defendant then appeared, pleaded to the plaintiff's declaration, and went to trial—*Held*, that it was too late for the defendant to object, that there was no return to the summons in the writ of replevin, nor day given him in Court.

A *capias in withernam* is not a proceeding in the replevin, but as a punishment on the taker or distrainer of the goods mentioned in the replevin, for his improper conduct in putting them out of the way, so that the replevin cannot be proceeded in.

If the defendant before the return of the *withernam*, appears to the writ of replevin, and offers to plead *non cepit*, it will stay the *withernam*, as he is not concluded by the return of an *elongavit*.

The only return which the sheriff can make, where the goods cannot be found, is "*Eloigned*."

APPEAL from Saint Mary's County Court. Action of replevin for a bay colt, brought by the now appellant, against the appellee, on the 19th of January, 1824. A writ of replevin in the usual form issued to replevy the colt, and to give notice to the defendant, &c. There was no return made to the first writ, and an *alias* writ was issued, to which the sheriff made a return "*Eloigned*." On motion of the plaintiff a writ of *withernam* was granted to her, and issued, to which the sheriff returned "replevied and delivered as per schedule." The schedule was the appraisement of "one bay horse, \$30." The defendant then appeared, &c. To the declaration the defendant pleaded, 1. Property in himself. 2. Property in William Saunders, with a traverse, &c. To these pleas there were the general replications, and issues were joined. Verdict on both issues for the plaintiff. The defendant moved the Court in arrest of judgment on the verdict, and that it might be set aside upon the point saved at the trial. The Court, [KEY and PLATER, A. J.] were of opinion,

that there ought to have been a return to the summons in the writ of replevin, to give the defendant a day in Court to be heard—therefore the writ of *withernam* irregularly issued. This being a point reserved by the Court, with the consent of the parties at the trial, the verdict is set aside, and * this suit *non proessed*. Judgment was then entered for the defendant, for a return of the goods taken in *withernam*, with costs. From which judgment the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., ARCHER and DORSEY, JJ. by *Ashton*, for the appellant; and *Magruder*, for the appellee.

BUCHANAN, C. J. delivered the opinion of the Court. It appears in this case, that a *capias in withernam* was sued out on a return by the sheriff to a writ of replevin, that the goods were *eloigned*, and that on a return of the *withernam*, there was a voluntary appearance by the defendant in the replevin; which case was thereupon regularly proceeded in to trial, and verdict for the plaintiff. But the verdict was set aside by the Court, and the plaintiff *non proessed*, and judgment for costs entered for the defendant, on the ground, as stated, that the writ of *withernam* was irregularly issued, because it did not appear that the sheriff had summoned the defendant in the replevin. We do not, however, think, as the case is presented to us, that there was sufficient ground for the decision of the Court.

Whether the *capias in withernam* irregularly issued or not, was not a question properly before the Court. The subsequent proceedings and trial were not founded upon the *withernam*, but were in the action of replevin; and though regularly the sheriff, in taking the goods in the replevin, should summon the defendant according to the mandate of the writ, yet if he neglects to do so, and the defendant voluntarily appears in Court and defends the suit, as was done in this case, the omission by the sheriff to summon him, is thereby cured.

The object of the summons is to bring him into Court, to answer why he took the property mentioned in the replevin; and if he chooses to appear and plead to issue, without being summoned, he thereby waives all objection to the want of the formal notice prescribed by the writ; and it does not lie with him afterwards to say, that he was not summoned by the sheriff, and that no day was given him in Court. The *capias in withernam* is not a proceeding in the replevin, but as a punishment * on the taker or distrainer of the goods mentioned in the replevin, for his improper conduct in putting them out of the way, so that the replevin cannot be proceeded in. “It is distress against distress; one being taken to answer the other by way of reprisal.” If the defendant, before the return of the *withernam*, appears to the writ of replevin, and offers to plead *non cepit*,

it will stay the *withernam*; as the defendant is not concluded by the return of an *elongavit*, (the only return the sheriff can make, where the goods cannot be found,) the sheriff's being unable to find them not being of itself such proof that they were *eloigned* by the defendant, (which could not be unless he also took them,) as to subject him to the irrepleviable distress by writ of *withernam*, except when he holds out, and will not appear to the writ of replevin, to show that he did not take them. But all this has nothing to do with the proceedings in the replevin, which if in themselves regular, progress as if no *withernam* had issued, and are unaffected by any irregularity in the issuing or return of the *withernam*; which is a proceeding separate and distinct from the replevin.

We therefore think, there was no sufficient ground in this case, growing out of any supposed irregularity in issuing the *capias in withernam*, for setting aside the verdict; and that the plaintiff was entitled to a judgment on the verdict.

Judgment reversed, and judgment for the appellant on the verdict, &c.

EDELEN'S Lessee *vs.* SMOOT.—June, 1828.

Where a testator devised as follows: "*Item.* I give to my beloved wife E. a tract of land purchased of S. whereon I now live, during her natural life; and after her decease to my son R. to him and his heirs forever. *Item.* I give to my sons J. and B. all that tract or parcel of land being part of C. H. to be equally divided between the above mentioned J. and B; and my son J. to have his first choice of the above mentioned land. *Item.* I also give to my two sons J. and B. a small tract of land lying on," &c. "called H. containing 70 acres, to them and their heirs forever. In case either of my sons dieth before they come of age, then their part or parts of land, to be equally divided between the other two above mentioned brothers, or to the survivor of the above mentioned J. R. and B.—*Held*, that J. took only an estate for life in the tract called C. H. (a)

* APPEAL from Charles County Court. Ejectment for a tract of land called Calvert's Hope, containing 1,000 acres. **286** The defendant, (the appellee,) took defence on warrant, and plots were returned. The general issue was pleaded.

1. At the trial the plaintiff offered in evidence the patent of Calvert's Hope, dated the 1st of April, 1707, reciting that James Bouling, deceased, was in his life-time seized in fee simple of and in a tract of land called Calvert's Hope, originally laid out for 898 acres, which was granted to him on the 10th of June, in the 30th year of the dominion of Cæcilius, late Proprietary of the Province; and that Bouling had by his will devised the same to his wife, Mary, in tail,

(a) See *Winchester vs. Tilghman*, 1 H. & McH. 258, note.

who had since intermarried with Benjamin Hall, who, together with the said Mary, had obtained a special warrant to resurvey the said tract, in order to discover the quantity of surplus thereto belonging; that upon the return of a certificate of such resurvey, it appeared that there was the quantity of 303 acres of surplus land within the bounds of the said tract, for which the said Benjamin and Mary had secured to be paid, &c. There was therefore granted to the said Benjamin and Mary the original quantity, under the same limitations of estate as is expressed in the will of Bouling, as also the quantity of 300 acres of surplus land, unto them and their heirs forever, &c. He also read in evidence a deed from Francis Hall, the heir of Benjamin and Mary Hall, to John Parnham, dated the 24th of June, 1736, for a part of the tract of land called Calvert's Hope, described by courses and distances, and containing 472 acres. He also read in evidence a deed from the said Francis Hall to John B. Boarman, dated the 24th of June, 1736, for "all those tracts or parcels of land, one part being part of Calvert's Hope, the other Boarman's Rest, and the third The Indian Fields—the three tracts or parcels of land lie now undivided or in one tract, on the east side of Zachiah Swamp, beginning," &c. containing 590 acres. He then read in evidence the will of John B. Boarman, dated the 25th of April, 1747, to show a devise of part of Calvert Hope to Joseph Boarman and Raphael Boarman. In the said will, among others, are the following devises: "Item. I give and bequeath to my beloved wife Elizabeth Boarman, * a tract of land purchased of
287 Charles Smoot, whereon I now live, during her natural life; and after her decease to my son Richard Boarman, to him and his heirs forever. Item. I give and bequeath to my sons Joseph and Raphael Boarman, all that tract or parcel of land being part of Calvert's Hope, to be equally divided between the above mentioned Joseph and Raphael: and my son Joseph to have his first choice of the above mentioned land. Item. I also give and bequeath to my two sons Joseph and Raphael Boarman, a small tract of land lying on Zachiah Swamp, near the old bridges, called Hazard, containing seventy acres, to them and their heirs forever. In case either of my sons dieth before they come of age, then their part or parts of land to be equally divided between the other two above mentioned brothers, or to the survivor of the above mentioned Joseph, Raphael and Richard. Item. I give and bequeath to my daughter Henrietta Thompson, part of a tract of land called Simpson's Supply, one hundred and fifty acres, provided she makes my son Joseph Boarman satisfaction for fifty acres of the land." He then bequeathed to his wife sundry negroes, one of them a woman, during her natural life, then her and her increase to return to his three sons, Joseph, Raphael and Richard. He then bequeathed to his said three sons sundry negroes, to be equally divided, them, and their increase, between his said three sons at their arrival to the age of 18 years; and if either of them

should die before that age, then the survivor or survivors to receive the part or parts of the deceased. The plaintiff then gave in evidence a deed from Joseph Boarman to John H. Boarman, dated the 1st of January, 1759, whereby, in consideration of natural love and affection, and of five shillings, the said Joseph conveyed to the said John H. part of a tract of land willed to the said Joseph by his father, called Calvert's Hope, beginning, &c. and containing 200 acres more or less. He also gave in evidence the will of John H. Boarman, devising the said land to George W. Boarman, dated the first of January, 1804, viz. "Item. I give and bequeath to my son George W. Boarman, that part of Calvert's Hope deeded to me by my uncle Joseph Boarman, excepting part of the said tract of land deeded by me to my brother Raphael Boarman, to him, his heirs and assigns, *forever." He also gave in evidence a deed for the same land from George W. Boarman to Alexius Edelen, 288 the lessor of the plaintiff, dated the 9th of November, 1820, containing 200 acres more or less. The defendant then prayed the Court to instruct the jury, that Joseph Boarman and Raphael Boarman did not take a fee simple estate, but only a life-estate, in the devise to them of part of Calvert's Hope by the will of John B. Boarman herein before inserted. Which opinion and instruction the Court, [STEPHEN, C. J., KEY and PLATER, A. J.] gave to the jury. The plaintiff excepted.

2. The plaintiff then read in evidence the plots and explanations filed in this cause; and then offered to give in evidence that he had been in possession of the land, lying to the south of the fence, located on the plots from little black g, to little black b. To the admissibility of which evidence the defendant objected, as the plaintiff had not located such possession on the plots. But the Court overruled the objection, and permitted the evidence to go to the jury. The defendant excepted. The verdict and judgment being against the plaintiff, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, ARCHER, and DORSEY, JJ.

Stonestreet and *Ashton*, for the appellant, contended, that the Court below erred in directing the jury that by the will of John B. Boarman, the persons under whom the lessor of the plaintiff claims, took only a life estate in the lands in question. *Frogmorton vs. Holyday*, 3 Burr. 1625.

C. Dorsey, for the appellee, cited *Right vs. Compton*, 9 East, 273.

ARCHER, J. delivered the opinion of the Court. The Court are called upon to determine what estate Joseph Boarman took under the will of his father, John B. Boarman, in that part of the tract of land called Calvert's Hope devised to him.

The clauses of the will, having reference in any way to this particular devise, are in the following words: "*Item*. I give and bequeath
289 to my beloved wife Elizabeth Boarman, a tract * of land purchased of Charles Smoot, whereon I now live, during her natural life, and after her decease to her son Richard Boarman, to him and his heirs forever. *Item*. I give and bequeath to my sons Joseph and Raphael, all that tract or parcel of land being part of Calvert's Hope, to be equally divided between the above named Joseph and Raphael; and my son Joseph to have his first choice of the above mentioned land. *Item*. I also give and bequeath to my two sons Joseph and Raphael, a small tract of land lying in Zachiah Swamp, near the Old Bridges, called Hazzard, containing seventy-one acres, to them and their heirs forever. In case either of my sons dieth before they come of age, then their part or parts of land to be equally divided between the other two above mentioned brothers, or to the survivor of the above named Joseph, Raphael and Richard."

Were it not for the last clause which devises Joseph's part over to his surviving brothers on the contingency of his dying before he arrive to the age of twenty-one, the case would be indisputably clear. In the clause containing the devise to Joseph, no words of limitation are added; and that, and the subsequent clause, being entirely distinct, the words of limitation which it contains, cannot have reference to, or attach themselves to the previous clause. In *Gilbert on Devises*, 21, it is said, "if a man devises Blackacre to his son; *Item*, he gives Whiteacre to his said son and his heirs—the son hath but a life estate in Blackacre, because there are two distinct devises. But if he had devised Blackacre, and also Whiteacre, to his son and his heirs, the son would have had a fee in both." And the reason assigned is, that it is one entire devise, and the word heir has relation to the whole sentence. The word *Item* is used to mark and distinguish the different clauses in a will, and they are so distinguished and separated here; and this will, standing on those two clauses alone, comes precisely within the scope of the authority cited, and would be clearly a life estate. But the doubt arises upon the last clause, "and in case either of my sons die before they come of age, then their part or parts of land to be equally divided between the other two above mentioned brothers, or to the survivor of the above mentioned Joseph, Raphael and Richard," which, it is urged, is

* evincive of the testator's intention to pass to Joseph an
290 estate in fee in the first devise to him, and that consequently it has the effect of defining and enlarging the estate which would otherwise have been transmitted. The case of *Frogmorton vs. Holyday*, 3 Burr. 1618, is relied upon to establish this position. That case contained a clause similar to the clauses under consideration, and it was adjudged to pass a fee; but it must be remembered that there were other clauses which had a material bearing in the decision of that case, from all of which, taken together, it was adjudged to be

the intention of the testator to pass a fee, as the general clause manifesting a disposition to dispose of all the testator's wordly affairs and estates, and a charge of fifty pounds to be paid out of the rents and profits of the estate; which, though in ordinary cases, could have no effect in enlarging a devise without words of limitation to a fee, yet in this case was considered, under its peculiar circumstances, as having a tendency, combined with other clauses, to manifest the intention to give a fee. There was there also a sweeping residuary clause, in which no mention was made of the real estate. Lord Mansfield grounded his opinion of the intention to pass a fee from all the above clauses combined. Mr. Justice Wilmot, it is worthy of remark, however, relied solely on the charge upon the annual rents and issues and profits of the estate, upon the general clause manifesting a disposition to dispose of all her estate, and on the residuary clause, and did not advert to the devise over, if the devisee died in his minority, as having the least effect upon his mind.

But if any doubt could be entertained relative to the construction of this will; those doubts are entirely dissipated by an adjudication of this Court directly in point, in *Owings vs. Reynolds et al. Lessee*, 3 H. & J. 141. There J. Owings devised as follows: "I give and bequeath to my wife my dwelling plantation during her natural life, and after her decease to fall to my son Lot Owings; and if he should die under age, it is my will the said land should fall to my son Caleb Owings, and my daughter A. Odell." And it was determined that Lot Owings took only a life-estate, and the limitation over, if Lot Owings died in his minority, was determined to have no effect in passing a fee; although there was in the will a general clause, * expressive of an intention to dispose of his whole estate, **291** that being considered only as matter of form, and as not having much influence, and only in favor of the clear intention of the testator.

In this will now under our consideration, there are no clauses or words from which an intention can be elicited to pass a fee, nor are there any clauses, other than those which have been above stated, that can by possibility be considered as having the least bearing on the subject.

We are of opinion, therefore, that Joseph Boarman took only a life estate in the tract of land called Calvert's Hope.

Judgment affirmed.

PRICE vs. READ.—June, 1828.

A defendant who purchased a slave at less than her value, and agreed at the time of the sale, not to sell her out of the State, but afterwards sold her to a person out of the State, is to considered as guilty of a cheat.

the year 1816, promised to pay the said tobacco debt. It was further proved in evidence that the tobacco was of a very low price at the time the debt was contracted. The defendant then prayed the Court, and their instruction to the jury, that the plaintiff, under the pleadings in the cause, could not have a verdict in tobacco; but that the same must be commuted into money. But the Court, [PLATER, A. J.] refused to give such instruction, but did instruct the jury that the plaintiff was entitled to recover tobacco, and that the jury could not commute the debt, under the pleadings in the case. The defendant excepted. Verdict for the plaintiff, and the quantity of 3,900 pounds of tobacco found to be due from the defendant's testator to the said

276 Hawkins. Judgment being * rendered on the verdict for the penalty of the bond, (the debt declared for,) to be released on payment of the said quantity of 3,900 of tobacco, with interest thereon from the 20th of August, 1819, and costs, the defendant appealed to this Court, where her death being suggested, &c. the present appellant appeared as her administratrix to prosecute the appeal.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DORSEY, JJ.

Ashton, for the appellant. There was no replication assigning breaches of the condition of the bond, nor any other assignment of breaches, in consequence of which, according to the decision in the cases of *Brent and others vs. Davis*, 10 *Wheat.* 395, and *The Corporation of Washington vs. Young*, *Ib.* 406, rendered it impossible for the Court to know what judgment should be entered.

The Court below erred in refusing to grant the prayer of the defendant below on the subject of the jury's commuting the tobacco into money, which is contrary to the decision of this Court in *Lyles vs. Lyles*, 6 *H. & J.* 273.

No counsel argued for the appellee.

280 * DORSEY, J. delivered the opinion of the Court. The judgment of the County Court must be reversed on various grounds. In the first place, the suit appears to have been brought by a creditor upon a testamentary bond, without showing any such justification for this proceeding, as is required by the Act of 1720, ch. 24.

In the next place there are no pleadings in the cause, which could warrant the Court in rendering the judgment they have given. The agreement filed, which was designed to supply the want of regular pleadings, is so informal, uncertain and defective, as to be wholly insufficient for that purpose. To sustain a judgment on a testamentary, or any other bond with a collateral condition, obtained on verdict, by default, on *nil dicit*, a case stated, or by confession, not ascertaining the sum on payment of which the penalty of the bond

is to be released, the replication must set out a cause of action; or it must appear on the roll with sufficient certainty by way of assignment of breaches. The filing the account, which is set forth in the transcript, forms no portion of the pleadings in the case; nor does it properly constitute any material part of the record. It can then furnish no aid to the equitable plaintiff, by which he can extricate himself from the incurable objection to his proceedings, which set forth, neither the nature nor amount of the claim, for the recovery of which his suit was instituted. That judgments, not resting wholly on confession, will be reversed for want of pleadings made out in due form, has been so frequently decided in this, and the former Court of Appeals, that to sustain such a position, a reference to decisions is no longer necessary.

There was error also in the opinion of the County Court instructing the jury that the plaintiff was entitled to recover tobacco, and that the jury were not at liberty to give their damages in money. For the reasons before stated, the plaintiff below could not have obtained a judgment for anything; but if the pleadings in the cause would have sustained any judgment at all, as settled by this Court in *Lyles vs. Lyle's Ex'rs*, 6 H. & J. 273, it was competent for the jury to have given their damages in money instead of tobacco.

Judgment reversed, and procedendo awarded.

* LAIDLER *vs.* THE STATE, use of HAWKINS.—June, 1828. 281

In an action on a testamentary bond, after the plaintiff had filed his declaration, the defendant confessed a judgment for the penalty of the bond and costs, with an agreement that the judgment should be void, on payment of 3,900 pounds of net crop tobacco, with interest until paid, and costs—*Held*, that this confession superseded the necessity of assigning breaches of the condition of the bond, and authorized a judgment for the plaintiff. (a)

Where the Court may be called on to pronounce an opinion on the plaintiff's right to recover, the intervention of a jury being necessary to assess the damages sustained, there an assignment of breaches, either in the declaration, or by way of replication, or entry on the roll, as the case may be, is necessary; but where every thing is confessed, and nothing is left for the decision of either Court or jury, the assignment of breaches in an act of supererogation.

APPEAL from the Charles County Court. Debt upon the same testamentary bond as that mentioned in the preceding case of *Laidler's Adm'x vs. The State, use of Hawkins*, (*ante*, 277,) brought against Catherine C. Laidler, (now appellant,) one of the sureties therein. This case, like that referred to, was continued for several terms

(a) See *Kerr vs. State*, 3 H. & J. 435, note (b).

under a rule on the defendant to plead to the declaration; and at August Term, 1819, the *cestui que use* filed the same account and proof as stated in the before mentioned case. The same agreement as to pleadings, was also entered into; and at that term, (August, 1819,) the defendant confessed judgment to the plaintiff, which was entered for the penalty of the bond, (the debt declared for,) and costs; with an agreement that the judgment should be void on payment of 3,900 pounds of net crop tobacco, with interest from the 20th of August, 1819, until paid, and costs. From which judgment the defendant appealed.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DORSEY, JJ. by

Ashton, for the appellant.

No counsel argued for the appellee.

DORSEY, J. delivered the opinion of the Court. This case, although upon the same bond and with the same pleadings, as the case of *Laidler's Adm'x vs. The State, use of Hawkins*, * decided
282 by this Court at the present term, (*ante*, 277,) must receive a different determination. There the judgment was rendered below, upon trial and verdict, without any admissions or consent of the defendant. Here the judgment was rendered by the County Court, on the defendant's confession, that the plaintiff had a right to recover; thereby admitting of record the compliance with the pre-requisites of the Act of 1720, ch. 24. And the confession also ascertains the precise sum, on payment of which the penalty recovered was to be released. This confession withdraws the plea of general performance, and admits everything which the plaintiff desires to establish, or could be required to bring to issue by regular pleadings. Could it then be necessary—is it consistent with any rule of pleading, that the plaintiff should file a replication, the statements in which, are neither an answer to, nor a denial or avoidance of, any of the matters alleged by the defendant? Where the Court may be called on to pronounce an opinion on the plaintiff's right to recover, where the intervention of a jury is necessary to assess the damages sustained, there an assignment of breaches, either in the declaration, or by way of replication, or entry on the roll, as the case may be, is indispensably necessary. But where everything is confessed, where nothing is left for the decision of either Court or jury, the assignment of breaches is an act of supererogation. And such is the effect of the decision of this Court in the case of *M'Mechen vs. The Mayor, &c. of Baltimore*, 2 H. & J. 41, where, in an action upon an auctioneer's bond, the defendant pleaded general performance, but afterwards withdrew his plea and confessed judgment—On an appeal to this Court, where one of the errors assigned was the want

of a replication assigning breaches, the Court affirmed the judgment.

The question as to the insufficiency of the pleadings, subsequent to the declaration, does not arise in this case, as the judgment was not rendered upon them, but upon the defendant's confession.

Judgment affirmed.

Though regularly a sheriff in taking goods under a writ of replevin, should summon the defendant according to the mandate of the writ, yet if he neglects to do so, and the defendant voluntarily appears in Court, and defends the suit, the omission by the sheriff to summon him is thereby cured.

So where to a writ of replevin, the sheriff made no return, and an *alias* writ was issued, to which the sheriff made a return "*Eloigned*," and the plaintiff then sued out a *capias in withernam*, to which the sheriff returned, "replevied and delivered, as per schedule," and the defendant then appeared, pleaded to the plaintiff's declaration, and went to trial—*Held*, that it was too late for the defendant to object, that there was no return to the summons in the writ of replevin, nor day given him in Court.

A *capias in withernam* is not a proceeding in the replevin, but as a punishment on the taker or distrainer of the goods mentioned in the replevin, for his improper conduct in putting them out of the way, so that the replevin cannot be proceeded in.

If the defendant before the return of the *withernam*, appears to the writ of replevin, and offers to plead *non cepit*, it will stay the *withernam*, as he is not concluded by the return of an *elongavit*.

The only return which the sheriff can make, where the goods cannot be found, is "*Eloigned*."

APPEAL from Saint Mary's County Court. Action of replevin for a bay colt, brought by the now appellant, against the appellee, on the 19th of January, 1824. A writ of replevin in the usual form issued to replevy the colt, and to give notice to the defendant, &c. There was no return made to the first writ, and an *alias* writ was issued, to which the sheriff made a return "*Eloigned*." On motion of the plaintiff a writ of *withernam* was granted to her, and issued, to which the sheriff returned "replevied and delivered as per schedule." The schedule was the appraisement of "one bay horse, \$30." The defendant then appeared, &c. To the declaration the defendant pleaded, 1. Property in himself. 2. Property in William Saunders, with a traverse, &c. To these pleas there were the general replications, and issues were joined. Verdict on both issues for the plaintiff. The defendant moved the Court in arrest of judgment on the verdict, and that it might be set aside upon the point saved at the trial. The Court, [KEY and PLATER, A. J.] were of opinion,

recover. Which direction the Court, [ARCHER, C. J. and HANSON, A. J.] refused to give; but instructed the jury that there was no evidence to go to the jury to establish the fact, that the agreement was with them individually. The plaintiff excepted.

2. The plaintiff to support the issue on his part, offered in evidence to the jury, by Thomas S. Schoolfield, that the plaintiff in this cause was associated with the defendant and several others, in the City of Baltimore, in business not rendering it the duty of any of them to leave the city; that the concern had property in Savannah, Amelia Island, and elsewhere, to the south; that at a meeting at Laborde's the defendant, the witness, and several others of the concern, were present, one of whom proposed they should employ the present plaintiff to go to the south after said property belonging to said concern, of which the plaintiff was a member; that it was agreed to by the persons present, and the witness sent after the plaintiff, who was not present, but who afterwards attended—That it was then proposed to the plaintiff, to go to the south after said property, and Laborde, the defendant, and the others of said concern, offered to give him \$500, as a compensation for his services, if he would go, to which the plaintiff acceded, and did go, and was absent on said business, witness believes, three or four months; that nothing was said
297 at the time about paying the plaintiff * out of the joint funds of the concern, or that such fund was to be charged therewith; nothing was said about the other members of the concern being exclusively liable. The defendant then prayed the Court to direct the jury, that upon this evidence the plaintiff was not entitled to recover. Which opinion and direction the Court gave. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued at June Term last before BUCHANAN, C. J., MARTIN, STEPHEN, and DORSEY, JJ.

Mayer, for the appellant, cited *Bradford vs. Kimberly*, 3 Johns. Ch. 433; *Van Ness vs. Forrest*, 8 Cranch, 30; 1 Chitty, 339.

Meredith, for the appellee, cited *Holmes vs. Higgins*, 1 Barn. & Cress. 74, (8 Serg. & Lowb. 27;) *Smith vs. Barrow*, 2 T. R. 476; *Harvey vs. Crickett*, 5 Maul. & Selw. 340; *Lamatere vs. Caze*, 1 Wash. C. C. 436; *Murray vs. Bogart*, 14 Johns. 318; the case of *Bradford vs. Kimberley*, 3 Johns. Ch. 433, cited by the appellant's counsel, and *Franklin vs. Robinson*, 1 Johns. Ch. 157, are the only cases in which a partner has been held entitled to compensation for extra services, and they were both cases in Chancery, where the partners were at liberty to investigate the whole accounts, and protected from being compelled to pay, if the balance was on the whole against the claimant partner.

299 * But it is now a general rule, that where the agreement is executed, the general form of declaring is sufficient. But

then the plaintiff's right of recovery must be independent of the special agreement; that is, he must have a right to recover, supposing no special agreement to have been made. If his right of action depends alone on the existence of such an agreement, he must declare upon it. *Payne vs. Bacomb*, 2 Dougl. 651; *Tuttle vs. Mayo*, 7 Johns. 132; *Cooke vs. Munstone*, 4 Bos. & Pull. 355. Now in this case if the plaintiff is entitled to recover at all, it can only be in virtue of the special agreement. The case, therefore, is completely within the exception. *Curia adv. vult.*

BUCHANAN, C. J. at this term, delivered the opinion of the Court. The first bill of exceptions being properly abandoned by the counsel for the appellant, it is considered as out of the case.

The question arising on the second bill of exceptions, is a question of construction.

The plaintiff and defendant, with several others, were associated together in business—they were partners in trade. If the contract, which gave rise to this action, was entered into by such of the members of the concern as were present, in their individual characters—if it was a personal contract, then the plaintiff, under the pleadings in the cause, would be entitled to recover; as there is nothing to prevent one partner from suing another on a mere private undertaking. But if the undertaking by the defendant, and the other partners present, was not merely personal, but on account of the copartnership, the plaintiff is not entitled to recover, on the general principle, that one partner cannot maintain an action against his copartners, * for work and labor done, &c. on account of the partnership.

And we think, that the engagement by the defendant and the others of the concern who were present, to give the plaintiff \$500 for going abroad on the business of the concern, in which he, as a partner, was equally interested with the other partners, was not a private, individual contract, but an undertaking on account of the concern. The same engagement entered into with a stranger would have been binding on the firm; and the present plaintiff, as a member of that firm, must have contributed his proportionate part of the sum contracted to be paid. And what is there in the mere circumstance of his being employed as the agent to transact the business required to be done, in the place of a stranger, to give to the same terms an entirely different meaning and character, and to turn into a separate individual undertaking on the part of some of the partners, a contract, which in the case of another, would have been considered as made on account of, and binding upon the firm? We can perceive nothing. The services rendered, were for and on account of the firm—the compensation for those services to be paid by the firm, and his just proportion of that compensation to be borne by the plaintiff, as one of the firm. He could not sue the firm of which he

was himself a member, nor can he sustain this suit against one of his copartners for services rendered the firm.

The Court are of opinion that the judgment of the Court below ought to be affirmed.

STEPHEN, J. dissenting, delivered the following opinion. The first bill of exceptions taken in this case being abandoned by the appellant's counsel, it only remains for this Court to consider and decide upon the second. That exception presents the following statement of facts. [After stating the facts, he then proceeded as follows:] The general principle is clear and incontrovertible, that one partner cannot sue another at common law for a partnership claim, unless there be a settlement of accounts between them, and a balance struck. It was formerly held that an express promise to pay was likewise necessary; but the law now seems to be settled, that such promise is not essential. * The reason is, that as between the parties, as
301 partners, their relative rights cannot be known, or the relation of debtor and creditor ascertained, until there is an adjustment of their accounts, either by themselves or by a bill in equity for an account. But it is equally clear and indisputable, that where one partner has an admitted claim against another; or, in other words, where one partner has in his hands money belonging to another partner, which he has not a right to carry to the partnership account, an action will lie at law to recover it, and that it is not necessary to resort to Chancery for that purpose. This principle is established in *Smith vs. Barron*, 2 T. R. 476, where the Court decided that one partner might maintain an action for money had and received against another partner, for money received to the separate use of the former, and wrongfully carried to the partnership account. Ashurst, Justice, says, "the sum now claimed by the plaintiff did not belong to the partnership account; and as the defendant has received a sum of money belonging to the plaintiff alone, which he has wrongfully carried to the partnership account, he is liable to refund it in this action." Grose, Justice, says, "supposing that the plaintiff had received this money, he would have been entitled to have set apart for his separate use the whole sum, except that part which belonged to the partnership account. Then the circumstance of the defendant's having received it cannot alter the right." So in the case now before this Court—if the \$500 had been paid to the plaintiff according to contract, on his performing the stipulated service, can there be a doubt that he would have had a right to appropriate it to his own exclusive use? If he could, can his right be so materially changed by the bad faith of those with whom he dealt, in not paying it to him according to their agreement? In *Gow on Partnership*, 144, the law is stated to be, that where one partner pays a partnership debt out of his own individual funds, equity will enforce a contribution. Formerly, indeed, (he says,) contribution was always obtained through the medium of

a bill in equity, although latterly, actions at law between partners for a contribution have become frequent. In support of this principle see also *Wright vs. Hunter*, 1 *East*, 20, which was an action at law by one partner against another for contribution on account * of money paid to a creditor of the copartnership. This case like- **302**

wise shows, that the defendant in this case was liable to the whole demand, he not having pleaded in abatement that there were other partners. Lord Kenyon says, "as between a creditor and the partners, all are liable for the whole debt, though as between the partners themselves, each is only answerable for his respective share. The plaintiff here stands in the relation of a creditor to the other three partners. He might sue all or one of them; and as the defendant has not pleaded in abatement, I think the whole money may be recovered from him." The case of *Holmes vs. Higgins*, 8 *Serg. & Low.* 27, is distinguishable from the present; because in that case there was no express promise of compensation to the partner, whose services were rendered to the partnership. He was merely appointed to perform a particular duty, without a promise of payment. As to the liability of one partner to be sued by another in the case of an express undertaking, the case of *Van Ness vs. Forrest*, 8 *Cranch*, 30, is referred to as a very strong authority. In *Bradford vs. Kimberly*, 3 *Johns. Ch.* 433, Chancellor KENT says, "in the case of joint partners, the general rule is, that one is not entitled to charge another, a compensation for his more valuable or unequal services bestowed on the common concern, without a special agreement; for it is deemed a case of voluntary management. But where the several owners meet, and constitute one of the concern an agent to do the whole business, a compensation is, necessarily and equitably, implied in such special agreement, and they are to be considered as dealing with a stranger." Suppose in this case the partnership had been insolvent, would not Causten have had a right to recover his stipulated compensation from the persons contracting with him as individuals? Or, would he have lost it? According to the evidence contained in the bill of exceptions, the promise was general and absolute, not qualified or conditional, and it amounted to a waiver of any right to have the partnership accounts adjusted prior to payment. If he had been selected for the agency, without an express promise of remuneration, it would have been similar to the case of *Holmes vs. Higgins*, 8 *Serg. & Low.* 27, referred to in the argument. A partner is entitled to nothing for services rendered in and about the partnership * concerns. When, therefore, he was employed for a valuable consideration to go on this business to the south, it shows **303**

that those who contracted with him did not deal with him in the character of a partner, but as they would have dealt with a stranger. Would not the money when received by him have belonged to him exclusively, or could it have been carried to the partnership account? If he would not have received it as a partner, it is clear that it could

not have been carried to the partnership account. Why then make the right of recovering it to depend upon a final settlement of the partnership transactions? And it is only in such a case, that a resort would be necessary to a Court of equity to compel payment. As to the necessity of declaring upon the special contract, the law is stated to be, that "with respect to debts for work and labor, or other personal services, it is a rule that however special the agreement was, yet if it was not under seal, and the terms of it have been performed on the plaintiff's part, and the remuneration was to be in money, it is not necessary to declare specially and the common *indebitatus* count is sufficient." 1 *Chitty's Plead.* 338. To the same effect is the case of *Mudd vs. Mudd*, 3 H. & J. 438. Upon the subject of the liability of one partner to be sued by another, there is a very late case, *Coffee vs. Brian*, 11 *Serg. & Low.* 25. The facts of that case were as follows: "Thomas Coffee, the plaintiff, John Coffee, and Brian the defendant, were jointly concerned in the Irish butter trade; John Coffee consigned the butters to Brian in London, who sold them, and Thomas Coffee accepted bills, drawn by John, to the amount of the butters sent. The profits of the various transactions were divided between the three parties. Brian having received the proceeds from a certain quantity of this butter, Thomas expressed uneasiness at accepting bills in his own name, without some security for the risk he incurred; when Brian engaged to provide for the bills at maturity, out of the proceeds already received. Thomas Coffee having been obliged to pay the bills, now sued the defendant for the amount in an action on the bills, and for the money had and received," on which count the Court thought the plaintiff was entitled to recover. In that case it was insisted that the whole transaction was a partnership concern, and that therefore, an action would not lie by one partner against his copartner, no balance having been struck, * nor any agree-

304 ment entered into to pay separately. In deciding this case, Best, C. J. observes, "It has been objected that this is a partnership transaction, and no doubt the money came to the defendant as the money of all three of the partners; but that has happened which divest them of the joint property in it, and vests it in the plaintiff. The defendant says, I have money in my hands, the produce of these butters, and if you will accept certain bills, I will hold the money on your account, in case of your being called on to pay the bills. When the bills were paid, therefore, the money in the defendant's hands became separated from the partnership account." Park, J. says "a partner may sue for a balance due to him upon an account closed, and an agreement to pay the amount, and this is a case of the same description." This case establishes the principle that one partner may support an action against another partner without ascertaining by a settlement of their partnership dealings, whether he is a debtor or creditor of the concern, where there is an express engagement by one partner to pay him for a particular service rendered to the

partnership, out of the partnership funds; for Park, Justice, observes, "the butters were consigned on the account of three, but it was necessary that one of them should accept bills, and Thomas Coffee refused to do this without some kind of security; upon which the defendant agrees to appropriate for that purpose, money already in his hands." This case could only have been likened to an account closed, and an agreement to pay the balance, upon the ground, that the express assumption of the partner to pay his copartner, if he should be compelled to pay the bills when they became due, the amount he should so pay, amounted to a waiver of the settlement of their partnership transactions, and to an acknowledgment or admission of his right to receive the promised indemnity or reimbursement, without such a settlement. If the case now before this Court is to be viewed under the aspect of a partnership transaction, the above authority, it is conceived, settles the principle, that for a sum of money expressly promised by one partner to another for a particular service rendered to the concern, he may sue in a Court of common law, without an ascertainment of the relation of debtor and creditor first having been made. And it is here worthy of remark that the rigor of the law upon this subject has been lately much relaxed; 305
 * for although it was formerly holden that there must not only be a balance struck, but an express promise to pay, yet it is now well settled that such express promise is not necessary to enable one partner to sue another at law. But if this case is not to be considered as a partnership transaction, but as a contract between those partners who were present and the plaintiff, in their individual capacities, the right of the plaintiff to recover in this suit is entirely free from doubt, there having been no plea in abatement filed in the cause.

I am of opinion that the judgment ought to be reversed.

Judgment affirmed.

WATERS' Representatives vs. RILEY'S Adm'r.—June, 1828.

B. as administrator *de bonis non*, with R. and W. as his sureties, by order of the Orphans' Court in 1806, entered into a joint administration bond. W. died in 1810, and R. in 1814. After the death of W. judgments were obtained on this bond against B., and R. the surviving surety, on account of which large payments were made by R., the principal being insolvent. The real estate of W. after his death, being sold by decree of a Court of equity, for the payment of his debts—on the petition of the representatives of R. claiming to recover contribution, for the payments made by him, out of such proceeds—*Held*, that they were not entitled to recover.

In the case of a joint bond, the remedy at law survives against the surviving obligor, and is lost, as against the representatives of him who first dies. (a)

(a) Examined and distinguished in *Zollickoffer vs. Seth*, 44 Md. 376. In that case it was held that the legatees of a surety on an administration bond

Where the remedy at law is gone, Chancery will not revive it, in the absence of fraud, accident, or mistake.

The case of a bond where all are principals, has been held to be an exception to the above rule, each being equally benefited, and under an equal original moral obligation to pay the debt, independent of the bond, to which equity relates back, when the remedy at law on the bond is gone.

In the case of a surety, who is bound only by the bond itself, and is not under the same moral obligation to pay, equity will not interfere, to charge him beyond his legal liability.

It is a general principle, that a surety who has paid the debt, may compel his co-security to make contribution, or may by substitution take the place of the creditor, and acquire all his rights against the principal debtor, but he can acquire no rights, that the creditor had not, and cannot, therefore, compel a contribution by the representatives of his deceased co-security, against whom the creditor had no remedy.

Where the Legislature prescribes the substance of a bond, and it is so drawn as to include every obligation imposed by the law, and to afford every defence given by it, it will be sufficient, notwithstanding it may be slightly variant from the literal form set out. *Per* ARCHER, J.

306 * APPEAL from an order of Montgomery County Court, sitting as a Court of Equity. The petition of the appellee to that Court stated, that on the 23d of November, 1818, a decree was passed by the Court for the sale of the real estate of Richard Waters, deceased, (the ancestor of the appellants,) and a trustee appointed to make such sale; who in pursuance of the said decree, sold the said real estate for \$4,000, which sale was duly reported and ratified by the Court at November Term, 1819, when the auditor was directed to state an account of the said sale, and the claims of all the creditors of the said Waters, which was accordingly done on the 25th of July, 1820, in which the claim of the petitioner is stated, but the amount is not ascertained. At March Term, 1821, the said report of the auditor was ratified by the Court. Prayer that the auditor may be ordered to make a further report of the petitioner's claim, and ascertain and report to the Court the amount thereof; and for this purpose a commission may issue to the auditor, authorising and directing him to take testimony touching the said claim, &c. And for further relief, &c. On the 25th of November, 1823, the auditor was directed to proceed to state the claim of the petitioner; and that a commission issue to him to take testimony, &c.

are liable to contribute, in proportion to the amounts respectively received by them, to the payments of judgments recovered against the executor of the co-surety of their testator, and which said executor had paid. Under Rev. Code, Art. 64, s. 51, where two or more persons are jointly bound by any instrument of writing, whether sealed or unsealed, to pay money or to do any other thing, and one or more of such persons shall die, his or their executors or heirs, shall be bound in the same manner and to the same extent as if the person so dying had been bound severally as well as jointly. The case in the text is approved in *U. S. vs. Price*, 9 Howard, 83, and *Pickersgill vs. Lahens*, 15 Wallace, 144.

The parties afterwards, on the 16th of November, 1824, entered into the following agreement: It is agreed in this case that the petitioner's intestate, and Richard Waters, entered into bond on the 17th of November, 1806, as securities for Mesheck Browning, administrator *de bonis non* of John Holmes, in the words following, to wit: "Know all men by these presents, that we, Mesheck Browning, George Riley and Richard Waters, of Montgomery County, are held and firmly bound to the State of Maryland in the sum of four thousand dollars, to be paid to the State aforesaid, or its certain attorney; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this seventeenth day of September, one thousand eight hundred and six. The condition of the above obligation is such, that if the above bounded Meshach Browning shall well and truly perform the office of administrator *de bonis non* of John Holmes, late of * Montgomery County, deceased, according to law, and shall in all respects discharge the duty of **307** him required by law as administrator *de bonis non* aforesaid, without any injury or damage to any person interested in the faithful performance of the said office, then the above obligation shall be void; it is otherwise to be in full force and virtue in law." Signed and sealed by the above mentioned obligors. The execution of which bond was admitted. It was also admitted that the said bond was drawn by the order of the Orphans' Court, in the form in which it now appears as a joint, and not as a joint and several bond. Also that Richard Waters died in the year 1810, and that George Riley survived him, and died in 1814 or 1815, and that the petitioner administered on his estate; that after the death of Waters judgments were obtained on the said administration bond, against Meshach Browning, (who also survived Richard Waters,) and the said George Riley; and that in the year 1815, and afterwards, payments were made by the said Riley on account of the said judgments, amounting to \$1,000. That the said Meshach Browning was insolvent at the time the said judgments were obtained, and has so continued always since. That since the death of the said Waters his real estate hath been sold by a proceeding in this Court against his administrator and heirs at law, for the payment of his debts, under the Act of 1785, ch. 72; and that there is now in the hands of the trustee upwards of \$1,000. The petitioner claims to be allowed out of the fund one-half of the sums paid by his intestate and himself, on account of those judgments. Which is objected to on the part of the representatives of the said Waters. The Court, [KILGOUR and WILKINSON, A. J.] (November Term, 1824.) It seeming just, and according to equity, that the petitioner should receive from the proceeds of the sale of the real estate of Richard Waters, heretofore sold under a decree of this Court for the payment of the debts of the said Waters, by Zadock

Magruder the trustee appointed for that purpose, the sum reported by the auditor appointed by this Court, to be due to the petitioner as administrator of George Riley—Ordered, that the trustee aforesaid pay over to the petitioner the sum of \$1,314.59, from and out of the proceeds of the said sale remaining in the hands of the said trustee.

308 From this order the * representatives of Richard Waters appealed to this Court; and it was agreed between the parties, that if upon the final decision of this case in this Court, this Court should be of opinion that the petitioner's claim ought to be allowed, or that he is entitled to any relief out of the fund in the hands of the trustee, on account of the joint suretyship of George Riley and Richard Waters, or of any payments made by George Riley, or the petitioner therefor, or any liability therefor, that then, the case shall be sent down to the County Court, with such opinion of this Court, and that then in the County Court the parties may by a reference to the auditor exhibit any claims or off-sets on either side, so that the order may pass for the payment of such sums as shall be then due, and the Court shall think just and proper.

The cause was argued at June Term, 1827, before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and ARCHER, JJ.

F. S. Key and *Z. Magruder*, for the appellants, contended, 1. That the bond was void, being a statutory bond, and not according to the form prescribed by the Act of 1798, ch. 101, sub-ch. 3, s. 11, sub-ch. 5, s. 6, not having the words "not already administered," inserted in the condition as required. 2. If the bond was not void, all remedy at law against Waters, ceased at his death, and equity, (he being only a surety,) will not enlarge the legal liability.

On the first point, they referred to 3 *Am. Dig.* 72, which cites *Rhodes vs. Vaughan*, 2 *Hawks N. C. Rep.* 167; *Morgan vs. Blackiston*, 5 *H. & J.* 61; *Shivers vs. Wilson*, *Ib.* 130. They **309** also referred to the Act of 1798, ch. 101, sub-ch. 14. s. 11, to show that a representative of a security in an administration or testamentary bond, could not call for counter security.

On the second point, they cited *Iudlow vs. Simonds*, 2 *Caine's Cas.* 57; *Harrison vs. Field*, 2 *Wash. Rep.* 138; *Thomas vs. Frazer*, 3 *Ves.* 399; *Simpson vs. Vaughan*, 2 *Atk.* 31; *Bishop vs. Church*, 2 *Ves.* 101; 1 *Poth.* 245; *Williams vs. Hodgson*, 2 *H. & J.* 480, (note:); *King vs. Baldwin*, 2 *Johns. Ch.* 560; *Riggs vs. Murray*, *Ib.* 567; *Simpson vs. Field*, 2 *Cas. in Chan.* 22; and the Act of Assembly of 1811, ch. 161.

No counsel argued for the appellee.

Curia adr. vult.

BUCHANAN, C. J. at this term delivered the opinion of the Court. It appears from the admissions in the cause, that on the 17th of September, 1806, George Riley and Richard Waters, as sureties, entered into a joint administration bond, with Meshach Browning,

administrator *de bonis non* of John Holmes, that Richard Waters died in the year 1810, and George Riley in 1814 or 1815, on whose estate the appellee administered; that after the death of Waters, judgments to a considerable amount were obtained on the administration bond, against Browning and Riley, the surviving surety, on account of which large payments were made by Riley, Browning being insolvent; that the bond was drawn and executed by order of the Orphans' Court of Montgomery County, in the form in which it appears, by which tribunal it was intentionally required to be "joint," and not "joint and several;" and that since the death of Waters, his real estate has been sold for the payment of his debts, under proceedings regularly instituted for that purpose.

The proceeds of which, in the hands of the trustee, are sought to be subjected to the payment of half the amount so paid by George Riley, on account of the judgments rendered against him and Browning on the administration bond, which is resisted on the part of the heirs and representatives of Waters. In the case of a joint bond, the remedy at law survives against the surviving obligor, and is lost as against the representatives of him who first dies.

* If then, this was a suit at law, on the bond, by those interested in the estate of Holmes, against the representatives of Waters, it clearly could not be sustained, the remedy, by the death of Waters, having been lost as against his representatives. Nor could Chancery, in proceedings between the same parties, fix the representatives of Waters, with a liability which did not exist at law. The general rule being, that where the remedy at law is gone, Chancery will not revive it, in the absence of any accident, fraud or mistake; to which the case of a bond, where all are principals, has been held to be an exception, each being equally benefited, and under an equal original moral obligation to pay the debt, independent of the bond, to which equity relates back, when the remedy at law on the bond is gone. But in the case of a surety, who is bound only by the bond itself, and is not under the same moral obligation to pay, equity will not interfere to charge him beyond his legal liability. **310**

And surely there is no evidence here of either mistake or fraud. The Act of Assembly, under which the bond was taken, does not require that such bonds shall be "joint and several," but is silent on that subject; and the admission stated in the record is, that it was intentionally ordered by the Orphans' Court, to be drawn and executed as a joint bond. Mistake then, there was none, since it is admitted, that what was done, whether judiciously or injudiciously, was intentionally done. And there is as little evidence of fraud of any kind. On whom could fraud have been committed? Not by the parties, or either of them, upon the Orphans' Court, because they executed the bond, under, and in pursuance of the directions of the Court; and certainly not by the Court itself, of which it may be

proper to remark, there has not been the slightest insinuation. And Waters, not having been a principal in the bond, but only a surety, the exception in relation to principals, who are under the same moral obligation to pay the debt, being equally benefited, would not reach the case. Is there, then, in this case, any thing to enable a Court of Chancery to extend to the appellee any relief, to which those interested in the estate of Holmes would not have been entitled? If there is, we have not been able to perceive it. There is no doubt (as a general principle,) that a surety, who has paid the debt, may compel his co-security to make contribution; or he may, **311** by substitution, take the place * of the creditor, and acquire all his rights against the principal debtor. But he can acquire no rights that the creditor had not, and cannot, therefore, compel a contribution by the representatives of his deceased co-security, against whom the creditor had no remedy. So long as the securities in a joint bond are living, the creditor has his remedy against both, and one may recover against the other a just proportion of what he is made to pay, both being under the same obligation to pay. But if one dies, the remedy, as to him, is gone, and the duty, and the remedy both survive against the survivor; and there being nothing due from the representatives of the other to the creditor, a payment by the survivor cannot be for, or on their account, nor can it create any liability in them that did not before exist. In such a case the surviving surety pays only his own debt, in which the representatives of the other have no concern, and his only remedy is against the principal debtor. This is just that case; on the death of Richard Waters, the remedy on the administration bond of those interested in the estate of Holmes, survived against George Riley, the surviving co-security, and Browning, the administrator and principal in the bond, with no liability resting on the representatives of Waters. The payments, therefore, by George Riley, on the judgments obtained against him and Browning, could create no charge against the representatives of Waters, on account of debts, for which they were in no way responsible; and which could not by the creditors have been enforced against them either in law or equity. In this view of the case, we think that the proceeds of the real estate of Waters, in the hands of the trustee, cannot be charged with any proportion of the sums paid by George Riley on account of those judgments; and that the decree ought to be reversed.

ARCHER, J. dissenting, delivered the following opinion. Two objections have been made to the decree of the Court below.

1. That the bond is void, being a statutory bond, and not according to the form prescribed by the Act of Assembly, not having the words, "not already administered," in the condition, as required by the Act of 1798, ch. 101, sub-ch. 5, s. 6.

2. That at the death of Waters the liability was extinguished both at law and in equity.

* Upon the first question it must be remarked, that the Legislature by the Act of 1798, ch. 101, sub-ch. 3, s. 11, in pre-
 scribing the form of the condition of a bond to be executed by an executor or administrator, never intended that the form should be literally pursued, but they intended only to prescribe the substance and effect of the condition. This section expressly declares, that the condition shall be to the following effect; and then gives the form. The sub-ch. 5, s. 6, of the same law declares, that the letters, bond and oath, of an administrator *de bonis non*, shall be in the form directed in the case of an executor, except that the words "not already administered," shall be added in the proper places. By looking at the form of the bond, oath and letters, prescribed in the section previous to the fifth section, it will be discovered that these words could not have been intended to be inserted in the condition of the bond, there being in the words of the Legislature, no proper place for their insertion. The bond is perfect without them, by barely stating the obligation to discharge the duties of administrator *de bonis non*, instead of those of executor or administrator; and when this change in the phraseology is effected, the condition corresponds in every particular with the condition prescribed by the Act. 312

The Legislature must have intended the insertion of the words "not already administered," to apply to the oath and the letters, in which alone, according to the forms they have prescribed, would there be appropriate places for the insertion of such words.

But if by any construction the bond could be considered as specially referred to, and being one of the instruments indicated as containing a proper place for the insertion of these words, I would not wish to be understood, as intimating an opinion that on the failure to insert these words, the bond would, therefore, be inoperative and void. On the contrary, I think, that where the Legislature prescribes the substance of a bond, and the bond is so drawn as to include every obligation imposed by the law, and to afford every defence given by it, it will be sufficient, notwithstanding it may be slightly variant from the literal form set out. This is the doctrine maintained in *Rhodes vs. Vaughan*, 2 Hawk's N. C. Rep. 167, and I would adopt it here as consistent with reason and propriety. Now the designation of * the administrator, by the name of administrator *de bonis non*, as explicitly and intelligibly defines his duties, as if it had been in so many words stated that he was to administer on "goods not already administered." Of course his obligations are the same, and he would be deprived of no defence he might otherwise have had. 313

With regard to the second objection, it is perfectly clear, as a general principle, that where a bond is joint, and one of the obligors die, the remedy of the obligee exists against the surviving obligor alone,

and that it is extinguished against the representative of the deceased obligor; and that in ordinary cases equity will not interpose to give relief to the obligee by enabling him to pursue the estate of the deceased obligor in the hands of his representatives. But there are exceptions to this general rule, as where a bond is made joint by fraud, ignorance or mistake, in which cases equity will revive the duty. So, too, where the lending is to two, and they both have the benefit of the loan, there exists on the part of both obligors a moral obligation to pay, and equity will enforce the obligation against the representatives of the deceased obligor, although the bond be joint, and not several; as in the case of *Simpson vs. Vaughan*, 2 Atk. 33. The borrowing on the one side, and the lending on the other created, in the language of Lord Hardwicke, a reasonable presumption, that the bond was either, through fraud or mistake, or for want of skill, made a joint bond, instead of a joint and several bond. The original contract of lending and borrowing was that each and both should pay, and in such case the Court will presume fraud, ignorance or mistake, in the change of a contract from a joint and several to a joint contract. A surety in a joint bond, not having participated in the borrowing of money, or in its original consideration, is bound to the obligee by no moral obligation whatever to pay, but merely by the legal force of the bond, and there would be nothing in such a case upon which to build an equity by which the duty as against him should be revived. These are the doctrines, as it respects obligees enforcing obligations which are joint, against the representatives of deceased obligors.

It remains to be considered how far these doctrines can be assimilated to the cases of sureties in joint obligations claiming
314 * contribution. And here it is necessary to consider upon what this doctrine of contribution is founded. It is said by the Court in *Deering vs. Earl of Winchelsea*, 2 Bos. & Pull. 272, that it is founded on a principle of equity, and not on a contract; but in *Claythorne vs. Swinburne*, 14 Ves. 169, it is perhaps more properly intimated, that as it is founded in equity, all who become sureties may be considered as contracting with regard to the principle of equity, which demands contribution. It is then a principle of equity that the losses of the sureties are to be equally borne, and the contract between the sureties is in reference to this doctrine of equity. This equitable principle of contribution extends to joint, as well as several bonds, and to sureties, where even their names appear upon different instruments. *Deering vs. Earl of Winchelsea*, 2 Bos. & Pull. 270. If it be built either on the principle of equity alone, or on a contract in reference to the existence of such a principle, can the accidental death of a joint obligor defeat this equity? Sureties always having reference to this equity, rely on the contribution to lessen their responsibilities and ultimate eventual and contingent losses, and of course look to the character, solvency and safety of their co-securities, deriving from those circumstances a greater security. It is impossible to say, that

if the contribution is founded in contract, that it could be defeated by the death of the co-securities. And if the contribution depend not on contract, but upon equity, that such equity can be defeated by the death of one and the survivorship of the other obligor. In the case of an obligee pursuing a surety's estate, equity will not interpose, because where equity is equal the law must prevail, and the bond as to his estate is extinguished at law. Now the surety's equity is equal to the obligees—no consideration passes between them, there is no moral obligation to pay, and he is only bound by the letter of his contract. How different is the case of a demand for contribution there, there is no equality of equity if one pays the whole, in saying he must bear it. There exists between them a clear moral obligation to apportion the loss, to say nothing of a contract between them, which would demand the interposition of equity to lighten the burthen which has been thrown upon one of them.

The obligee cannot enforce a bond extinguished at law, for he has no equity which would give it life.

*The surety does not even seek to revive the bond in asking contribution of his co-security. He asks it in virtue of a consequence which has befallen him from the original signature. He does not, in any case, ask to revive it, for that could not be done; his payment alone had extinguished it. But he asks it, because it would be against conscience, that the estate of one who had entered into the suretyship with him, between whom there was a privity, and in relying on whose solvency and ability to relieve him from a portion of any burthen which might fall on him, he had entered into the bond, should be entirely exonerated. **315**

To say that the bond was extinguished as against Waters' estate, does not meet the question. For the equity of the survivor, who is obliged to pay, looks to the source and origin of the transaction, and will, and ought, to coerce that original obligation that existed between them, and which is founded on the highest and clearest equity and justice.

Any contrary view must be grounded on the notion, that the sureties in the bond looked to its joint character, were acquainted with the legal principles which attached to it, and gravely contemplated their exoneration by death; which would be a very forced presumption, utterly inconsistent with fact, and with all those motives which experience teaches us operates upon mankind in such situations. I do not mean to assert that contribution is founded on contract; it would be sufficient to justify my view, that it has its foundation on a moral obligation. But I cannot but think, that there is much reason for saying that it may be viewed in the light of a contract. For contribution is so obvious an equity, that every man must be supposed to look to it, and looking to it, I think it could violate no principle to say, that the sureties, in case of loss, tacitly enter into a contract to bear each a portion of the burthen. And, although it is positively

asserted, that contract has nothing to do with the liability, yet, is not this doctrine clearly contradicted by the fact, that Courts of law maintain actions of assumpsit, in which contribution is enforced? For how would such an action lie but upon the idea of a contract, express or implied? If it be said that it lies on the principle of justice, or on moral obligation, this in itself will not be sufficient, unless from * such moral obligation you can infer a contract.

316 And it will be found in *Peck vs. Ellis*, 2 Johns. Ch. 136, that the jurisdiction of Courts of law in contribution between sureties, is expressly placed upon the ground of an implied assumpsit arising from the knowledge of the general principle, that equality is equity.

It has been correctly remarked, that "rights claimed by, and injuries arising from survivorship, are not viewed in a very favorable aspect, either at law, or in equity." *Jenkins vs. De Groot*, 1 Caine's Cas. 122. And this case, it strikes me, is of all cases which could be selected the least favourable for enforcing advantages claimed to the deceased's estate from the survivorship of his co-security.

I am clearly of opinion, that the decree of the Court below was correct, and that it ought to be affirmed. *Decree reversed. (a).*

BROWN vs. PURVIANCE.—June, 1828.

A master is answerable for all injuries arising from the negligence, or unskilfulness of his servant in executing duties assigned him; but when he abandons his duty, and wilfully becomes a wrong-doer, the master is exempt from all responsibility for such wrongful acts.

B. the harbor-master of the City of Baltimore, acting in obedience to a lawful order of the board of health of that city, ordered a vessel, belonging to the plaintiff, to be removed from a wharf, and moored in the stream. He employed C. to perform that duty, who having finished it, with his associates, hired for the purpose aforesaid, returned from the vessel to the shore, in a boat belonging to her, which they there abandoned, and was lost to the plaintiff. The boat was demanded of B. by the plaintiff, and he having omitted to return her, an action of trover was brought against him—*Held*, that from the time the vessel was moored in the stream, C. ceased to be B's agent, and that for no acts of his or their consequences after that period was he responsible.

(a) *Note.* Since the execution of the bond referred to in the preceding case, the Act of 1811, ch. 161, has enacted, "That if two or more persons are jointly bound for the payment of a debt, or for the performance, or forbearance of any act, or for any other thing, and one or more of the said obligors die, his or their representatives may be charged by virtue of such obligation, in the same manner as such representatives might have been charged if said obligors had been bound severally as well as jointly." Upon the construction of this Act—See the case of *Pike vs. Dashiell's Adm'r*, 7 H. & J. 466. (H. & G.)

* APPEAL from Baltimore County Court. This was an action of trover to recover the value of a stern-boat, brought by the appellee against the appellant. The general issue was pleaded. **317**

At the trial, the plaintiff (the now appellee,) offered in evidence, that about the 1st of Sept. 1819, he was possessed, as owner of the brig called Strong, then lying at Jackson's wharf in the City of Baltimore, and that there was a stern-boat belonging to the said brig worth \$60; and that the defendant, (now appellant,) then was the harbor-master of that part of the port of Baltimore where the said brig lay at her moorings; that the board of health of the City of Baltimore, acting within the scope of their authority, ordered all vessels lying at the different wharfs in that part of the port of Baltimore to be moved into the stream; and that it was the duty of the defendant or harbor-master to promulgate the orders of the board of health, and to have them executed. That the board of health did order the said brig to be moved from Jackson's wharf into the stream, and that the defendant did make the said order known. The plaintiff further offered in evidence, that there was not at that time any officers or crew attached to the said brig, and that on the 10th of September, 1819, one Bragger did move the said brig into the stream. And that Bragger and his assistants, returned to another part of the harbor in the boat, and tied her there, and that she was afterwards lost. The plaintiff also offered in evidence, that previous to the institution of this suit, he had demanded the return of the said boat from the defendant; and that the said Bragger, and his assistants, were employed by the defendant, as harbor-master, for the purpose of executing the orders of the board of health; and that in the removal of the said brig and boat as aforesaid, the said Bragger and his assistants, acted as agents of the defendant, in his capacity of harbor-master. The plaintiff further offered in evidence, that after the said brig had been moored in the stream about two weeks, the plaintiff took possession of her, but that the boat was missing from the time that she was left by the said Bragger, and his assistants, as aforesaid, and has not since been found. The defendant then prayed the * opinion and direction of the Court to the jury, that upon the facts so offered in evidence, the plaintiff was not entitled to recover. Which prayer and direction the Court, [ARCHER, C. J., HANSON and WARD, A. JJ.] refused to give; but were of opinion, and so directed the jury, that upon the evidence, if they believed the same, the plaintiff was entitled to recover. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court. **318**

The cause was argued at June Term, 1827, before BUCHANAN, C. J., EARLE, STEPHEN, and DORSEY, JJ.

Scott, for the appellant, cited 2 *Wheat. Selw. N. P.* 1050, 1059, 1060, 1068, 1073, 1074, 1075, 1076; *Mair vs. Glennis*, 4 *Maule & Selw.* 250; 2 *Phill. Evid.* 117, 121.

Williams, (District Attorney of U. S.) for the appellee.

Curia ad. vult.

DORSEY, J. at this term, delivered the opinion of the Court. Before adverting to the question of law which arises in this case, it is necessary to determine, whether the act complained of be the result of negligence or unskillfulness in the servant of the appellant, in performing the task imposed on him by his employer, or be the wilful outrage of the servant, as a wrong-doer? That it was the latter, is, we think, clearly established by the facts stated in the bill of exceptions. Brown, the * harbor-master, acting in obedience
319 to a lawful order of the board of health of the City of Baltimore, employs Bragger, as his servant or agent, to move the brig into the stream. In this he acted in the usual course of his duty; the services of the harbor-master in person, being in such cases out of the question. Bragger removes the vessel into the stream, (where she appears to have been safely moored;) from that moment, *functus officio*, he ceased to be the agent of Brown. For no acts of his, or their consequences, after that period, can Brown, upon any principle of law, be made liable. As well might an action be instituted against him, for the forcible or unauthorized seizure, by Bragger, of the boat of any third person, before the removal of the brig, but for the purpose of accomplishing that object, as it may be on the present occasion; or, with as much propriety, might Brown be charged for injury done to the appellee, if Bragger and his associates, after mooring the brig in the stream, had turned round and set her on fire, or plundered her of her tackle, apparel and furniture. But suppose the brig had not been moored in the stream, and Bragger and his crew had not only run off with the boat, but the brig also; would it be pretended that Brown could be made responsible for such an outrage? If he could, from a mere ministerial officer of a corporation, you must convert him into a common carrier, amenable for all accidents, save "the acts of God and the king's enemies."

The nature of the liability, to which a master is subjected for the acts of his servant, is so fully and satisfactorily settled in the case of *M'Manus vs. Crickett*, 1 *East*, 106, that Courts of justice should rarely be troubled with cases of this kind. The rule is simply this—the master is answerable for all injuries arising from the negligence or unskillfulness of his servant in executing duties assigned him; but when he abandons his duty, and wilfully becomes a wrong-doer, the master is exempt from all responsibility for such wrongful acts.

Judgment reversed.

* REESIDE vs. FISCHER.—June, 1828.

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Upon a case stated, as upon a special verdict, the Court are not at liberty to infer facts from the evidence therein, but the fact relied upon must be stated. (a)

Where the defence relied upon, was that the goods replevied were in the custody of the law. and the parties stated a case which showed, that the goods replevied had been levied on, but was silent as to the time of seizure, or whether at the time of the replevin from the officer who had levied on them, they were in his hands under a *fiery facias*—Held, that this might all be true, and still the goods not in the custody of the law.

APPEAL from Allegany County Court. This was an action of replevin, brought on the 4th of March, 1824, by the appellee against the appellant, and sundry goods and chattels were on the same day replevied by the sheriff out of the possession of the appellant, and delivered to the appellee. The appellant, (the defendant below,) pleaded, 1. *Non cepit*. 2. Property in himself. 3. Justifies the taking, &c. on the 21st of February, 1824, as one of the regularly appointed deputies of the marshal of the Maryland District, under and in virtue of a writ of *fiery facias* issued on the 18th of December, 1823, on a judgment rendered in a District Court of the United States for the Maryland District, on, &c. in favor of the United States against a certain Samuel Magill, &c. 4. Property in P. B., marshal of the Maryland District. 5. Property in Samuel Magill. Issue was joined to the first plea, and general replications and issues joined to the other pleas. The following statement of facts was agreed to by the parties: "It is admitted, that at the September Term, 1823, of the District Court of the United States for the Maryland District, a judgment was rendered against Samuel Magill, in favor of the United States of America, for the sum of \$535.10, and \$23.50 costs. Upon which said judgment a writ of *fiery facias*, directed to the marshal of the Maryland District, issued out of the District Court of the United States for the Maryland District, on the 18th of December, 1823, against the goods, &c. of the said Samuel Magill, returnable on the first Tuesday of March then following. That such *fiery facias* was by the defendant, a regularly appointed deputy of the said marshal, duly and regularly levied upon the goods and chattels mentioned in the declaration in this cause, then being in the actual possession of * the said Samuel Magill, but claimed by the plaintiff under the bill of sale hereafter mentioned." [The 321 record of the judgment, *fiery facias*, &c. contains a schedule of the property seized under the *fiery facias*, dated the 21st of February,

(a) Affirmed in *Van Brunt vs. Pike*, 4 Gill, 274. See *Mahoney vs. Ashton*, 4 H. & McH. 140, note; *Stewart vs. State*, ante, m. p. 114.

1824.] “It is further admitted, that previously to obtaining the said judgment, or issuing or levying such *fiery facias* by the said marshal, to wit, on the 21st of August, 1823, the said Magill, in consideration of the sum of \$367.81, executed and delivered to the plaintiff in this cause a bill of sale, duly executed, acknowledged and recorded, according to law, including therein the goods and chattels for which this action was brought. If upon the foregoing statement of facts the Court shall be of opinion that the plaintiff is entitled to recover, then judgment to be entered for the plaintiff. If the Court shall be of opinion on the statement of facts, that the plaintiff is not entitled to recover, then judgment to be entered for the defendant.” The County Court rendered judgment on the statement of facts for the plaintiff. From which judgment the defendant appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, STEPHEN, and ARCHER, JJ.

Meredith, for the appellant, insisted that the goods replevied were in custody of the law, having been taken by the appellant, (the defendant below,) as deputy marshal of the United States for the district of Maryland, upon a writ of *fiery facias* issued on a judgment rendered in the District Court; and, therefore, could not be replevied out of his hands. *Cromwell et al. vs. Owings*, 7 H. & J. 55.

Taney, (Attorney-General,) for the appellee. The property must be in the custody of the law at the time it is replevied out of the hands of the party. It is not stated, in the case stated, that the property was, when replevied, in the hands of the marshal, and taken by him under the writ of *fiery facias*. A case stated is analogous to a special verdict, where facts not expressly found, could not be inferred. *Mahoney vs. Ashton*, 4 H. & McH. 210, 213; 2 *Tidd's Pr.* 808, 809. An appeal or writ of error does not lie in England on a judgment * rendered on a case stated; and if not, do they
322 lie in this State?

Williams, (District-Attorney of the U. S.) in reply. It appears in the record that the property was seized under the *fiery facias* issued from the District Court, on the 21st of February, 1824. The writ of *fiery facias* was made returnable on the first Tuesday of March following. By law the marshal must give 10 days notice previous to the sale. The writ of replevin was issued and executed on the 4th of March, 1824, and as the 10 days notice had not then expired, the property must have been in the custody of the law when the writ of replevin was executed. The decision in *Mahoney vs. Ashton* is clearly erroneous, and cannot be sanctioned by this Court. *Jackson vs. Rightmyre*, 16 *Johns.* 314.

ARCHER, J. delivered the opinion of the Court. This case, it is supposed by the counsel for the appellant, is within the rule estab-

lished in *Cromwell et al. vs. Owings*, 7 H. & J. 55; because, as is contended by them, before the execution of the writ of replevin, the goods were seized by the deputy marshal of the United States for the district of Maryland, in virtue of a *fieri facias* issued from the District Court, and were by said officer held under the execution until the replevin was executed.

This case is brought up upon a case stated, and, like a special verdict, we are not at liberty to infer facts from the evidence therein stated, but the facts relied upon must be stated. *Palmer vs. Johnson*, 2 Wils. 163; 2 Tidd's Pr. 808, 809.

That the goods replevied had been seized under a *fieri facias*, is apparent from the statement, but it is silent as to the time of seizure, or whether at the time of the replevin from the deputy marshal, the goods were in his hands under the *fieri facias*. This might be all true, and still the goods not in the custody of the law. He might have sold them, and the purchaser may have left them in his hands, or the execution may have been countermanded, and the property not in fact redelivered, so that it is by no means a necessary conclusion, as has been contended, that the goods were in *custodia legis*.

There appearing to be no objection in the record to the legal title of the plaintiff, and as far as the statement shows, no legal impediment arising from the execution, the judgment of the Court below must be affirmed. 323

Judgment affirmed.

OEHLER *et al.* vs. WALKER *et al.*—June, 1828.

C. and his wife, made a gift of a sum of money to J. their eldest son, which was deposited with W. who undertook the trust of purchasing a tract of land therewith for J's use. In 1792, he purchased the land and took a conveyance to himself. J. died without issue, under age, and his rights devolved on his brothers and sisters, the eldest of whom attained the age of 21 in 1805, and died during that year. In November, 1815, the heirs of J. the *cestui que trust* in fee, filed their bill against the heirs of W. for a conveyance of the land in conformity with his undertaking—*Held*, (the trust having been fully established,) that the lapse of time, between the time of purchase and filing the bill, formed no bar to the proceedings. (a)

The cause, however, having been 12 years in the Court, from its commencement to the final decree, and many of the parties on each side of the docket, having died during that period, the Court, under the circumstances, determined to say nothing of the rents and profits received, or the improvements made by the trustee, (who was in possession for a part of the time,) or his representatives; but only to decree a conveyance in fee.

The County Court, as a Court of equity, having expressed an opinion upon the law and facts in the cause, in favor of the complainant's right: and

(a) See *Dorsey vs. Clarke*, 4 H. & J. 450, note.

as they were to be relieved, the only subject was, the extent of such relief. But as in the then stage of the cause, full justice could not be done, in order, therefore, that a final decision should be made—*Ordered*, that the auditor state an account between the parties, &c. Such account was stated by the auditor. After which that Court overruled the opinion before expressed upon the law and facts, and dismissed the bill. On appeal, the Appellate Court examined the whole case, and decided that the decree dismissing the bill be reversed.

APPEAL from Saint Mary's County Court, sitting as a Court of Equity. On the 8th of November, 1815, Nicholas Carberry and Rose Ann Carberry, filed their bill of complaint against Mary Millard, Jeremiah Booth, and Ann his wife, James Walker, Harriet Walker, Joseph Walker, Ann Walker, and Milly Walker, heirs-at-law of Bennet Walker, deceased; and under the leave of the Court they filed their supplemental bill in the names of Nicholas Carberry, Andrew Oehler, and Rose Ann his wife, late Rose Ann Carberry, against the above named defendants. The supplemental bill stated, that in
324 the * year 1792, a tract of land called Yielding Berry, then the property of Francis Thompson, was sold to satisfy an execution levied thereon, when Patrick Carberry, the father of the complainants, and Ann his wife, their mother, and sister of the said Thompson, who was then absent out of the State, being anxious to save the said land, so that it should not go out of the family of the said Thompson, entered into an agreement with Bennet Walker, that he should, at the sale of the land, become the purchaser, as trustee in fee for the use of James Carberry, who was then the eldest son and heir of the said Patrick, and Ann his wife, and brother of the whole blood to the complainants; and for that purpose the said Patrick, and Ann his wife, put into the hands of the said Bennet Walker the sum of £30, as also one hogshead of tobacco, to enable the said B. Walker to purchase the said land—he the said B. Walker, at the same time promising and agreeing with the said Patrick and Ann his wife, to stand seized of the said land for the use of the said James Carberry in fee; and when he should obtain a conveyance of the land from the sheriff of the county, that immediately thereafter he would convey the land to the said James Carberry, agreeably to the purport of the said agreement. But that the said B. Walker, although he did purchase the said land at the said sale, and pay for the same with the money and tobacco, or part thereof, (the land having sold for only £30, being much below its real value, on account of the said agreement—the persons attending the sale knowing of the agreement, and being unwilling to buy the land out of the family,) which he received from the said Patrick, and Ann his wife, for the purpose aforesaid and obtained a deed from the sheriff for the said land; yet fraudulently intending and contriving to wrong and injure the said James Carberry, and violate his said trust, (the said Patrick having died shortly after the said sale, and before the

execution of the deed aforesaid,) refused to make a conveyance of the said land, agreeably to his promise; but on the contrary, some years after the death of the said Patrick, and when the said Ann, his widow, had married with Arthur Thompson, demanded that the said Arthur should pay rent for the time that the said widow had lived on the said land after the death of the said Patrick, claiming the said land to be the * property of him the said B. Walker, and Joseph Walker, brother of the said B. Walker, to whom **325** the said land had been conveyed by the sheriff, jointly with the said B. Walker. And notwithstanding the said agreement the said B. Walker, (although the said Joseph Walker afterwards died, leaving by his will the said land to the said B. Walker,) never did, during his life-time, nor have his heirs or representatives, or any of them since his death, ever conveyed the said land to James Carberry, during his life-time, or to any of his heirs or representatives since his death. The complainants being the only surviving heirs and representatives of the said James Carberry, prayed by their said bill that the heirs of the said B. Walker be compelled to appear and answer, &c. also that they might be decreed to convey the said land agreeably to the promise and undertaking in trust of the said B. Walker—Also for general relief. The answers for the defendants (some of them being infants answered by their guardian,) stated that they were entirely ignorant of any of the transactions alleged in the complainants' bill to have taken place between the said Patrick Carberry, and Ann his wife, and Bennet Walker, nor had they, or either of them, ever heard the said Walker say any thing in relation thereto, nor had they any reason to believe that the said Walker did buy the land mentioned in the said bill, in trust for any person therein mentioned; on the contrary, they believe that the reverse was the truth, from the circumstance that the said Walker paid a full price for the lands—charged the said Carberry's widow a rent for the lands immediately after the purchase, and received payment for the same from Arthur Thompson, who intermarried with the said widow, a transaction utterly irreconcilable with the pretensions set up by the complainants. That the said Walker made very expensive improvements by erecting buildings on the said lands, resided thereon, and exercised uncontrolled acts of ownership over the said lands till his death, which happened in the year 1809, without any claim being prosecuted on the part of those who now claim under the pretended trust. They believe that if any such trust was ever entered into, that it was subsequently abandoned, as they had heard and believed, that the said Patrick Carberry was much embarrassed, and was in the habit * of obtaining money from Joseph and Bennet Walker. That they could not find among the papers of the **326** said Bennet Walker any papers whatever in relation to this pretended trust. They object and oppose to the complainants' bill, the great length of time which has elapsed since the purchase made by

the said Walker, the payment of rent made to the said Walker, by those who claim under the pretended trust, the omission to prosecute any claim, and the extensive and valuable improvements made thereon, &c. Commissions issued to take testimony, which was taken and returned, and the cause argued by the counsel of the parties.

The County Court, [JOHNSON, C. J.] at March Term, 1819, passed the following interlocutory decree: The object of the bill in this cause is to obtain from Bennet Walker's representatives a conveyance for a tract of land called Yielding Berry, which land, as alleged by the complainants, was in the year 1792, purchased at a sheriff's sale by Bennet Walker, at the instance and for the benefit of those under whom the complainants derive their title, with money furnished to him for that purpose. It appears satisfactorily established by the evidence in the cause, that the land was purchased in trust; and that, therefore, the trustee having failed to perform what in equity he was bound to have done, and the legal estate having devolved on the representatives in the cause, the complainants must be relieved, unless the grounds of defence are sustainable. The Statute of Frauds is no barrier to the recovery; and the length of time, either as applied to the Act of Limitations, or as a foundation to infer a transfer of the interest to the *cestui que trust*, are no impediments to the recovery—the former, not applicable to cases of this description, and the delay is clearly accounted for, without inferring thereby a transfer of interest. From the evidence it is established, that the purchaser, the trustee, never took the possession, or claimed rent until after the death of the first person for whom a life estate was reserved, nor until after the widow of Patrick Carberry, to whom also a life estate was to have been secured, entered into a second marriage, which continued until the filing of this bill. The cover-
327 ture, of course, must protect her interest from the Statute of Limitations, if otherwise it would have been * applicable to the cause; and the laches or delay of her husband in not pressing on her claim, can never impair it. As then a *feme covert*, under the trust, was entitled to a life estate, and as her right continued until it was, by deed, transferred to the complainants in the cause, no well founded charge of neglect in delay is imputable to them. These remarks are equally applicable to the payment of rent by the second husband. No matter with what motive it was done, whether voluntarily, or from imperious necessity, it could not affect his wife's interest, or those entitled to the land after her decease. As then the complainants are to be relieved, the only subject is the extent of such relief. It appears that in this stage of the cause full justice cannot now be done, because the terms on which the conveyances to be made are not ascertained; in order, therefore, that a final decision shall be made—Ordered, that the auditor of this Court state an account between the parties, in which he will state the rents received, while rents were paid, and the annual value of the land since the

time it has been in the possession of B. Walker, and his heirs, and give credit for all improvements made that enhanced the value of the property, with interest on the rents, on the value and on the improvements. That he will state another account, containing the profits of the land from the date of the deed from Arthur Thompson and wife, to the complainants. The statements to be made from such evidence as is in the cause, or from what shall be laid before him; and that he will, in like manner, ascertain and report whether sufficient assets have come from B. Walker to the defendants in the cause. The accounts and report to be subject to the further order of the Court.

The auditor, at August Term, 1819, made his report, charging the defendants with rents and annual value of the tract of land called Yielding Berry, for and from the year 1795 to the 26th of July, 1815, inclusive, and with interest thereon, &c. amounting to the sum of \$1,291.21, and crediting them on the 1st of January, 1805, with improvements made on the land, which enhanced its value, with interest thereon, to the 26th of July, 1815, amounting to \$3,676.87½, leaving a balance due to the defendants of \$2,385.66½. He also reported, that from the certificate of the register of wills, it appeared that sufficient * assets had not come from Bennet Walker to the defendants in the cause, to satisfy the claims of creditors. **328**

The complainants excepted to the auditor's report; and the Court, in March, 1820, directed the auditor to report from the evidence an account charging the defendants with the rent, when rent was paid, and with the value annually of the property while possessed by the defendants, or those they claim under, as that value was increased by improvements, and give interest on the rents, the improved value, and on the improvements. To state another account charging the defendants with the rents and value as before directed, without paying any regard to the costs of the improvements, and by charging the complainants with the real value of the improvements, as they advanced the present value of the land. To state a third account, charging the defendants with the rents while received, and with the annual value when possessed as aforesaid, by adding the annual interest on the money expended in improvements to the rent or value of the land, and by giving credit for the improvements, charging interest on each; and state the assets as before directed.

At August Term, 1820, the auditor made a report, and exhibited five accounts. By account No. 1, he stated a balance due to the defendants of \$2,604.84½. By account No. 2, he stated a balance due to them of \$1,818.61. By account No. 3, he stated a balance due to the complainants of \$2,048.16. By account No. 4, he stated a balance due the defendants of \$354.84½, and by account No. 5, he stated the balance due to the complainants of \$698.16. The complainants excepted to the report, and all the statements made by the auditor. The Court then passed an order that the auditor state

such other accounts as he should be directed by the respective parties. At March Term, 1822, the auditor again reported, and by his statement the balance due the complainants on the 3d of August, 1819, was \$710.66. At August Term, 1822, the death of Nicholas Carberry, one of the complainants, and at August Term, 1824, the death of Milly Walker, one of the defendants, were suggested. At August Term, 1826, the complainants filed in Court a deed dated the 26th of July, 1815, from Arthur Thompson, and Ann his wife, to Nicholas and Rose Ann Carberry, children of the said Ann, by her
329 former marriage, whereby, in * consideration of natural love and affection, the said Thompson and wife conveyed to the said Nicholas and Rose Ann, and their heirs, all that tract or parcel of land called Yielding Berry. The defendants objected to the auditor's last report, upon various grounds. The following agreement was entered into by the parties, viz. "That the defendants, and those under whom they claim, are the heirs-at-law of Bennet Walker, and his legal representatives; that he died in 1809, intestate, leaving a real estate of the value of \$9,000, which has been, under a commission of partition of the real estate of the said Walker, reported unsusceptible of division, and elected to be taken by James Walker, the eldest male heir, who gave bond and security in the usual form." The deaths of Jeremiah Booth, and Ann his wife, and Mary Millard, three other of the defendants, were suggested; and that John Llewellyn, and Mary his wife, were the heirs-at-law of the said Booth and wife, and that Mary Ann Millard was the heir-at-law of the said Mary Millard, who were permitted to appear and become parties defendants in the cause. At March Term, 1827, the death of Rose Ann Oehler, one other of the complainants, was suggested, and that Mary Ann Oehler and Elizabeth Ann Oehler, were the heirs-at-law of the said Rose Ann, who were permitted to appear by their guardian, and become parties complainants, &c.

The cause being submitted to the Court for decision, the Court [STEPHEN, C. J. and PLATER, A. J.] at March Term, 1827, passed the following decree: Independently of the lapse of time which has taken place since the alleged purchase, and the circumstance of the death of the trustee some years before suit was brought, this Court is not satisfied by the evidence in the cause, that Walker did purchase for the benefit of James Carberry, as stated by the complainants—the only testimony to that fact being the proof made by Arthur Thompson and wife whose testimony is very much shaken by the circumstance of their paying rent to the trustee. If the bill had been filed against Walker in his life-time, he would have had the benefit of his answer, instead of which the parties wait until after his death, and after he had made considerable improvements, before they institute any proceeding to recover the property. It is also a circumstance of some
330 weight, that the purchase money * was not advanced by James Carberry, in whom it is alleged a resulting trust vested, and under whom the complainants claim.—Decreed, that the bill be

dismissed, but without costs. From this decree the complainants appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, ARCHER, and DORSEY, JJ.

Ashton and Stonestreet, for the appellants, contended, 1. That Bennet Walker in 1792, became the purchaser of a tract of land called Yielding Berry, as trustee for the use and benefit of James Carberry. 2. That the lapse of time from 1795, when Walker obtained possession of the land, is not a sufficient bar to claim of specific performance. 3. That the Statute of Frauds cannot operate to avoid the purchase in trust; because there was no declaration of the trust in writing, as the purchase was made with Carberry's money. 4. That if the trust for James Carberry was void because of the want of a declaration thereof in writing, yet the trust was a resulting trust for the benefit of Patrick Carberry, the father of the complainants, and therefore should be specifically performed to his heirs. 5. That the death of Bennet Walker, before the commencement of the suit, is no ground against a decree for specific performance, inasmuch as the delay in beginning suit is sufficiently accounted for by the poverty of the heirs of Patrick Carberry, and the death of each of the sons before or shortly after coming of age. 6. That the payment of rent to Bennet Walker by the mother of the complainants, has no tendency to impeach or shake the evidence of herself or Arthur Thompson. 7. That the improvements made by Walker, during his life-time, with the knowledge of the complainants, does not invalidate the claim for specific performance, and at most, could only entitle the heirs to allowance for such improvements. 8. That the heirs of Bennet Walker should not only convey the said land to the complainants, but also account for the rents, issues and profits thereof, from the death of Bennet Walker. * 9. That the unwarrantable use and occupation of the land by Bennet Walker from 1795 to 1809, should be applied to ex- 331 tinguish his claim for compensation for improvements. 10. That the heirs of Bennet Walker, should be charged with the improved value of the land, from the time of Bennet Walker's death, and with interest at the rate of 6 per cent. upon each year's rent of the land. 11. That the first decree put an end to the question as to the complainant's right to relief, which decree was final, unless upon a bill of review it was annulled or changed. On the third point, they referred to 7 *Johns Ch. (General Index,) tit. Trusts and Trustees*, 256.

C. Dorsey, for the appellees, relied on the length of time, possession, &c. and referred to 1 *Madd. Ch.* 79, 73; 1 *Fonbl.* 329; *Pickering vs. Lord Stamford*, 2 *Ves. Jr.* 280; *Lord Shipbrook vs. Lord Hinchbrook*, 13 *Ves.* 396; *Hovenden vs. Lord Annesley*, 2 *Sch. & Lef.* 636, 639.

EARLE, J. delivered the opinion of the Court. The testimony in this cause is entirely satisfactory to our minds, that the purchase

made of the tract of land called Yielding Berry in 1792, by Bennet Walker, was for the benefit of the family of the then proprietors of the estate. The purchase money was raised by the sale of Anne Carberry's dower rights in the land called Ireland, and a gift made of it by her and her husband, Patrick Carberry, to their eldest son, James Carberry. As his, it was deposited in the summer of 1792, with Bennet Walker, who undertook the trust of purchasing in the land therewith for his use. It was purchased in by the trustee at the sheriff's sale, the November following; and the executed trust resulted for the use of James Carberry, who thereby became the *cestui que trust*, in fee. He died under age and without issue, and his rights devolved on his brothers and sister, the sons and daughter of Patrick Carberry and Ann Carberry, afterwards Ann Thompson; the oldest of whom, Francis Nicholas Carberry, attained the age of twenty-one, in April, 1805, and died in the month of August following. With these views of the facts before us we should think it is clear, that

332 * length of time forms no bar to the proceeding, and that the decree of St. Mary's County Court ought to be reversed.

This case depended in the Court below, from 1815 till the year 1827, during which period, death made many changes in the parties on each side the docket. For this reason we have determined to say nothing of the rents and profits of Yielding Berry, or of the repairs and improvements made thereon, and to decree only, that this tract shall be conveyed by the appellees to the appellants in fee simple.

Decree reversed.

CRAIN *vs.* YATES.—June, 1828.

From the earliest period to this time, tobacco had been considered in our judicial proceedings as current money, and actions of debt on bonds for the payment of it, have been constantly brought in the *debet and detinet*, without averring its value in the current coin of the State.

It has been the practice in actions of debt, to join tobacco and money counts, and the invariable course to render judgments in debt for tobacco, and costs in current money, or for costs in tobacco at a fixed and established value in current money.

In an action of debt, the plaintiff having declared on two obligations, one for the payment of tobacco at a given day, and the other of money on demand, the defendant cravedoyer "of the writing obligatory aforesaid," and of the writ, (a blank for the insertion of which was left.) and then pleaded the Statute of Limitations in two distinct pleas, neither of which referred expressly to either obligation, and in both of which the date of issuing the writ was omitted. On a joinder on a special demurrer by the plaintiff assigning the above as causes of demurrer, the Court held the pleas faulty in not ascertaining the time of the commencement of the action, nor discriminating between the obligations, to one of which limitations was no bar.

When a plea is only intended for a part of the declaration, the rule is, it must not cover the whole, but ascertain the part to which it is applied, or the plaintiff may demur.

Under a rule to plead issuably, such uncertain pleas would be deemed no plea, and the plaintiff might take judgment as for want of a plea.

APPEAL from Charles County Court. The plaintiff below, (now appellee,) on the 15th of October, 1821, brought an action of debt in the *debet and detinet*, against the defendant below, (the appellant,) upon two writings obligatory—one dated the 23d of July, 1802, for 992 lbs. of first quality tobacco, payable * on the 1st of January, 1803, with legal interest thereon, and the other dated the 15th of October, 1814, for \$153.23, payable on demand. The damages were laid in tobacco, and current money. The defendant pleaded three pleas—1. After craving oyer of the writing obligatory aforesaid and of the writ, (a blank for which was left for their being inserted,) he pleaded that the plaintiff ought not to have or maintain his action, “because he saith that the original writ in this cause was issued on the — day of —, in the year of our Lord, one thousand eight hundred and —, and not before, and that the debt or thing in action, in virtue of the said writing obligatory in the declaration aforesaid mentioned, became due and payable on the first day of January in the year eighteen hundred and three, and that twelve years and more have elapsed and expired from the day when the said debt or thing in action, in virtue of the said writing obligatory, became due and payable; and that the debt or thing in action, in virtue of the said writing obligatory, had been above twelve years standing before the day of the issuing of the original writ in this cause; that is to say, at Charles County aforesaid; and this the said Robert Crain is ready to verify, and so forth. Wherefore he prays judgment of the said Henry Smith Yates, his action aforesaid against him the said Robert Crain to have or maintain ought, &c.”

2. That the plaintiff, his action aforesaid against him to have or maintain ought not, “because he saith, that by a certain Act of the General Assembly of the (then Province, now) State of Maryland, passed at a session of Assembly begun and held at the City of Annapolis the twenty-sixth day of April, in the year of our Lord one thousand seven hundred and fifteen, entitled ‘An Act for limitation of certain actions for avoiding suits at law,’ it was, amongst other things enacted, ‘that no bill, bond, judgment, recognizance, statute merchant, or of the staple, or other specialty whatsoever, except such as shall be taken in the name or for the use of our sovereign lord, the king, his heirs and successors, shall be good and pleadable, or admitted in evidence against any person or persons of this Province, after the principal debtor and creditor have been both dead twelve years, or the debt or thing in action above twelve years standing,’ as by the same Act ever since and still in force more fully

334 appears. * And the said Robert Crain further saith, that the debt or thing in action in the said writing obligatory mentioned, was above twelve years standing at the time of the im-
 petration of the original writ in this cause; and this he is ready to verify, &c.”

3. Plea of payment. The plaintiff demurred specially to the first and second pleas, and assigned for causes of demurrer, 1. That there are two writings in the declaration mentioned, and the defendant cravingoyer thereof, says “he prays an hearing of the writing obligatory aforesaid,” without saying of which writing obligatory. 2. That the said plea has many blanks therein, omitting days, months and years. 3. That the said first plea states, that the said writing obligatory in the declaration mentioned, without stating which of the two writings obligatory in the said declaration mentioned. The plaintiff replied non-payment to the third plea, and issue was joined. The defendant joined in demurrer to the first and second pleas. The County Court ruled the demurrer good. Verdict for the plaintiff, and the jury found the debt due upon the writings obligatory to be 2,758 lbs. of crop tobacco, and \$85.91. Judgment rendered thereon for the damages laid in the declaration, to be released on payment of the tobacco and money found to be due by the jury, with interest until paid, and costs. The defendant appealed to this Court.

The cause was argued at June Term, 1827, before BUCHANAN, C. J., EARLE and MARTIN, JJ.

R. Johnson, for the appellant, referred to 1 *Chitty's Plead.* 643, *Lyles vs. Lyles*, 6 *H. & J.* 273; *Skirwin vs. Willis*, 4 *H. & McH.* 483. The Acts of 1812, ch. 135, s. 3, and Nov. 1781, ch. 16. 5 *Bac. Ab. tit. Pleas & Pleadings*, (B 3) 330; *Brown vs. Dickson*, 1 *T. R.* 276; 5 *Bac. Ab. tit. Pleas & Pleadings*; *Dupea vs. Mayo*, 3 *Saund.* 286, (and note 9;) *Pinkney vs. Inhabitants of East Hundred*, 3 *Saund.* 379; *Hughes vs. Sellers*, 5 *H. & J.* 432.

C. Dorsey, for the appellee, cited *Purriance vs. Neave*, 4 *H. & McH.* 199; 1 *Chitty's Plead.* 197; *Coryton vs. Lythebee*, 2 *Saund.* 117 b. (note 2.)

Curia adv. vult.

EARLE, J. at the present term, delivered the opinion of the Court. Our attention was called on the argument to the declaration in this cause as containing the first defects in the pleadings, which should
336 have been noticed in deciding the demurrer * disposed of by Charles County Court. It was asserted that the two counts therein could not be joined in the same action, one being on a single bill for tobacco, and the other on a like bond for current money. This subject we have considered, and we are of opinion, that the objection to the declaration is unsustainable. From the earliest period to this time, tobacco has been considered in our judicial proceedings

as current money, and actions of debt on bonds for the payment of it, have been constantly brought in the *debet and detinet*, and without averring its value in the current coin of the State. This being the case, there is no doubt that money and tobacco debts may be sued for in the same action. If the question is tried by the common rule, which we do not mention as a fixed and unerring standard, "that two counts may be joined where the same judgment is upon both," these counts may be well united in this declaration. They are of the same nature, both being for debts, although in a different currency, and the judgment for them is so far the same, that it may be executed by one and the same final process, whether it issue against the person or property of the defendant. It has, besides, for many years, been the practice in actions of debt, to join tobacco and money counts, as a recurrence to the records of our Courts will fully evince. The case of *Gordon & others against Wilson*, in 1788, and *Gordon & others against Pye*, in 1789, in the late General Court, are instances of this kind, and many others, it is believed, might be easily adduced. And it has been, moreover, the invariable course, to render judgments in debt for tobacco, and for costs in current money, or for costs in tobacco at a fixed and established value in current money.

The two first pleas to this declaration were rightly decided on, we think, by Charles County Court. They are pleas of limitation, designed to bar the action as to one of the obligations sued upon, but it is not sufficiently certain to which of them the pleas apply. They are introduced with a prayer of oyer of the writing obligatory aforesaid, without discriminating between them; and although in the first there is something like a designation of the tobacco bond, it is in other respects entirely faulty, in not ascertaining the time of the commencement of the action. When a plea is only intended for a part of the * declaration, the rule is, it must not cover the whole, but must ascertain the part to which it is applied, or 337 the plaintiff may demur. Under a rule to plead issuably, such uncertain pleas would be deemed no pleas, and the plaintiff might take judgment for want of plea. *Macdonald vs. Macdonald*, 3 Bos. & Pull. 174. Judgment affirmed.

BERRY vs. GRIFFITH.—June, 1828.

A sheriff has a right, and it is his duty, in due time to correct his return to a *fieri facias*, so as to make it conform to the truth of the fact, whatever that may be. and to give it effect and legal operation. (a)

(a) Approved in *Jarboe vs. Hall*, 37 Md. 349, and *Main vs. Lynch*, 54 Md. 668. The right of a sheriff to correct his return to a *fieri facias*, so as to make it conform to the facts of the case and legally effectual, is not limited

It is not true, that land when taken in execution, must be described in the schedule returned with the writ and advertisement, of its intended sale, with technical minuteness.

A sheriff cannot sell what has not been levied upon under the *fi. fa.* but a general description in the schedule returned with the writ, and in the advertisement of sale, is sufficient. (b)

The return should regularly, for the security of purchasers, describe the premises with precision; but it is enough, if the description, be such, as that the property may be clearly identified. (c)

A sheriff's return to a *fi. facias*, that he had laid it on all that part of the tract of land lying in M. County, called C. which was devised to the said B. (the defendant in the writ,) by his father R, to the value of, &c. that after having given due and public notice, of the time, place, manner, terms, and cause of sale, he did on, &c. expose to sale the said part of the said tract of land which lies on the N. W. side of the public road leading from R. in M. County, to B. containing 242 acres, and that G. then and there became the highest bidder and purchaser of the said last mentioned part of the tract or parcel of land, for the sum of \$2,000, which he had paid to the sheriff, shows a valid sale by the sheriff.

A sheriff may divide, and sell a part of the premises levied upon, and advertised, and where that will satisfy the debt, he ought to sell no more. (d)

APPEAL from Montgomery County Court. This was an action of trespass *q. c. f.*—for breaking and entering the close of the plaintiff, (the appellant,) called Charles and Benjamin. The defendant, (the appellee,) pleaded not guilty, and issue was joined.

At the trial the plaintiff proved by a competent witness, that he, the plaintiff, had held the land and premises in the declaration
338 * mentioned, under the will of his father, always since the death of his father, until the time of the sale hereinafter mentioned. And the plaintiff read in evidence the will of his father, Richard Berry, and proved the same. By which will, dated the 26th of August, 1818, the testator devised to his son Elisha D. Berry, (the plaintiff,) and his heirs, all the remainder of his tract of land called The Charles and Benjamin, not devised to his daughter Deborah. The will was proved on the 30th of November, 1819. The plaintiff

to the return term of the writ. *Jarboe vs. Hall*. This is a common law right, and is in no way dependent upon the provisions of Rev. Code, Art. 64, sec. 85. *Main vs. Lynch, supra*.

(b) Approved in *Waters vs. Duvall*, 11 G. & J. 48, and *Jarboe vs. Hall*, 37 Md. 351. Without a valid seizure the purchaser from the sheriff acquires no title. *Ibid*. See *Estep vs. Weema*, 6 G. & J. 303.

(c) Approved in *Nesbitt vs. Dallam*, 7 G. & J. 512; *Wright vs. Orell*, 19 Md. 155; *Busey vs. Tuck*, 47 Md. 175. The purchaser is entitled to the benefit of all the judicial proceedings in the case, and if they furnish a description from which the property can be identified, it is sufficient. *Busey vs. Tuck, supra*.

(d) Approved in *Dyer vs. Boswell*, 39 Md. 471, holding that sheriffs and collectors may not sell in mass a whole tract of land to pay a small sum of money, when the sale of one or two acres would be sufficient.

further proved by a competent witness, that the defendant had, after the purchase and sale by the sheriff, as hereinafter stated, directed one John Thomas the 3d, to cut timber trees on that part of said land, so before sold, as mentioned and described in the return of the sheriff hereinafter stated, and that the said Thomas had accordingly cut and removed them therefrom. The defendant, for the purpose of proving the title and possession of the said land in himself, produced and offered to read the following records and papers, viz. A record of a judgment recovered in Montgomery County Court in March, 1820, in the name of William Willson, and Anna Maria Willson, his wife, against Elisha D. Berry, for \$124.88 $\frac{1}{4}$ debt, \$300 damages and costs. The damages to be released on payment of interest on the debt from the 19th of June, 1816. This judgment was superseded by confession of judgment entered into by Elisha D. Berry, with Jannaro S. Farre and Alexander Young, on the 22d of February, 1821, before one of the Associate Justices of the Orphans' Court of the said county. Upon this confession of judgment a writ of *feri facias* issued on the 4th of March, 1822, against Berry, and his sureties. The sheriff returned the *feri facias*, that he had laid it on all that part of the tract of land lying in Montgomery County, called Charles and Benjamin, which was devised to the said Elisha D. Berry by his father, Richard Berry, to the value of \$6,000. That after having given due and public notice of the time, place, manner, terms, and cause of sale, he did on the 13th of August, 1822, expose to sale the said part of the said tract of land which lies on the N. W. side of the public road leading from Rockville, in Montgomery County, to the City of Baltimore, supposed to contain 250 acres more or less, but found on an accurate survey thereof * by the surveyor of Montgomery County, to contain 242 $\frac{3}{4}$ acres, as will appear by the plot annexed and returned. That at the said sale Henry B. Griffith and Richard H. Griffith, then and there became the highest bidders and purchasers of the said last mentioned part of a tract or parcel of land, at and for the sum of \$2,000, and which sum they had paid to the sheriff. Berry moved the Court to quash the *feri facias*, assigning certain reasons, which motion the Court overruled. The defendant also proved by several competent witnesses, that the land in the declaration mentioned, is the same land which is mentioned in the return of the sheriff above, and that the said land was sold by the sheriff of Montgomery County at public sale, and that the defendant became the purchaser thereof, as stated in the amended return of said sheriff. That the plaintiff was present at the said sale, and that it was at his request that the part of the land taken under the said execution, and so sold by the sheriff, was exposed to sale. That the plaintiff made no objection to the said sale, and that the defendant and Henry B. Griffith, then paid the purchase money to the sheriff, and the plaintiff thereupon paid a balance remaining unsatisfied of the executions

in his hands of nine or ten dollars to the sheriff. That the day after the said sale the defendant, and his co-purchaser Henry B. Griffith, engaged one Washington Owen to enter upon the said land, (there being no house or enclosure thereon,) and take charge of the same, and directed him to authorize one John Thomas to cut down wood, and enclose the fields on the said land, which he did. And that the said land had always been held, and considered as a part of the dwelling plantation of the plaintiff, until the said sale. That after the said Thomas had cut down the said trees, the plaintiff called upon him to know by what authority he had so cut them, and Thomas replied on the authority of the defendant. The plaintiff replied that it was all he wanted to know. The witness thinks Thomas went on to cut some trees after the plaintiff had so called upon him, and carried those he had previously cut down, to the field which he enclosed with them on said land. That the said Thomas did enclose and cultivated said fields, and that the defendant, and the said Henry B. Griffith, have continued in such possession of said land so purchased, ever * since. But the said

340 witnesses proved that they had no knowledge, except what is above stated, of the defendant or Henry B. Griffith, (his co-purchaser,) having been in possession of said land, and that they supposed he had possession in consequence of his authority given to said Thomas to cut wood. The said Thomas had, before the said sale, by the leave of the plaintiff, taken down wood from said land for firewood. And the plaintiff further offered the record of an action of ejectment brought by the defendant against the plaintiff. This record sets forth an action of ejectment brought by Henry B. Griffith and Richard H. Griffith's lessee, against Elisha D. Berry, on the 23d of December, 1822, for a tract of land called Charles and Benjamin, as described in the sheriff's return before mentioned, containing 250 acres. Which said action was entered, on the 10th of November, 1825, "off by plaintiffs." The plaintiff further proved by Richard Butt, a competent witness, and the deputy sheriff who made the sale, that there was land included in the sheriff's amended return which was not sold under the said execution to the defendant, but that the land on which the alleged trespass is said to have been committed, was sold as aforesaid. And the defendant proved by four competent witnesses, that all the land mentioned in the sheriff's return was sold as stated in the said return; and produced the receipt of said Butt to prove the same fact: "Received, August 13th, 1822, from Henry B. Griffith and Richard H. Griffith, two thousand dollars, for all the land lying on the north-west side of the Baltimore road, called Charles and Benjamin, late the property of Elisha D. Berry, sold by virtue of a writ of *venditioni exponas*, at the suit of William Scott, and a writ of *fi. fa.* at the suit of William Willson, and Anna Maria his wife.

EE. RICHD. BUTT, for
WILLIAM CLEMENTS, Shff. of Montgomery County."

And the plaintiff, in order to prove the irregularity of said sale, offered the following papers, marked B, one of which is admitted to be the inventory and appraisement, one the advertisement of sale, and the other a return which the sheriff had prepared and filed, and which was supplied by the amended return offered by the defendant, and which are as follow, viz. * The appraisement was of "part of a tract of land called Charles and Benjamin, containing 500 acres of land more or less, valued at \$6,000." The advertisement dated the 22d of July, 1822, (certified to have been published in the Rockville True American for 21 days before the day of sale,) stated that the sale would be at the residence of Elisha D. Berry on the 13th of August, then next for cash only, the following property, to wit: All the right, title, interest and estate, of Elisha D. Berry, of, in and to, part of a tract of land called Charles and Benjamin, containing 500 acres more or less, taken by virtue of a writ of *fi. fa.* issued from Montgomery County Court, at the suit of William Willson and wife, &c. A list of sales of the lands, &c. of Elisha D. Berry, sold under two writs of *fi. fa.* one at the suit of William Scott, and the other at the suit of William Willson and wife, the 13th of August, 1822, "part of a tract of land called Charles and Benjamin, lying on the N. W. side of the Baltimore road, containing 250 acres more or less.

Jno. Thomas, 3d. (To be sold in 30 min. if not complied with.)	\$2,405
2d. Deborah D. Berry (do. in 10 min. do.)	2,100
3d. H. B. & R. H. Griffith (do. 10 do. Pd. by H. B. & R. H. G.)	2,000 "

Upon the evidence aforesaid the plaintiff prayed the Court to instruct the jury that the defendant and Henry B. Griffith derive no title to the said land under the said sale, and that the plaintiff is entitled to recover. Which instruction, so as aforesaid prayed, the Court [KILGOUR and WILKINSON, A. J.] refused to give to the jury. The plaintiff excepted; and the verdict and judgment being for the defendant, the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE and ARCHER, JJ.

Magruder, for the appellant, contended, that the Court below erred in refusing the instruction to the jury as asked for by the plaintiff—1. Because the plaintiff's possession of the land entitled him to recover upon the evidence in the cause. 2. Because the proceedings of the sheriff under the *fieri facias* * in the record produced by the defendant, and the sale made by him of the land upon which the trespass was committed, were illegal and void. If the sheriff's seizure of property is not correct, he cannot afterwards make it correct. He must advertise and sell the property in conformity to his seizure. He cannot, if he advertised that the whole

of a tract of land was to be sold, sell only a part of the tract. *Sheldon vs. Soper*, 14 Johns. 352; *Jackson vs. Stricker*, 1 Johns. Cas. 284.

F. S. Key, for the appellee. Can it be improper for a sheriff to sell a part of a tract of land, instead of the whole tract, when by a sale of a part the debt will be made? Why cannot the sheriff accommodate purchasers by dividing the tract, and selling it in parcels? Suppose a sheriff levies a writ of *feri facias* on personal property, and advertises to sell the whole, can he not sell only a part, and in parcels, if by such sale he raises a sum sufficient to discharge the debt? In this case the land sold lay on the N. W. side of the road. The whole tract was divided into two parts by a tract running in between the whole tract.

Magruder, in reply.

BUCHANAN, C. J. delivered the opinion of the Court. This was an action of trespass for cutting down trees in a close, alleged to be the close of the appellant, who was the plaintiff below.

The appellant claims title to the land on which the trees were cut, under a devise from his father; and the defendant rests his defence upon a purchase of the same premises by himself and Henry B. Griffith, from the sheriff of Montgomery County, at a sale by auction, in virtue of a *feri facias* regularly sued out of the Montgomery County Court. And the sole question presented to us in argument is, whether the sale made * by the sheriff of the land on which
343 the trespass is supposed to have been committed was a valid sale?

To prove that the sale was irregular and void, the appellant offered in evidence the inventory and appraisement, in which the land upon which the *feri facias* was levied, is described as "part of a tract of land called Charles and Benjamin, containing five hundred acres of land more or less," valued at \$6,000. The sheriff's advertisement of sale, which is of "all the right, title, interest and estate, of the said Elisha D. Berry, of, in and to, part of a tract of land called Charles and Benjamin, containing five hundred acres more or less," both of them stating it to be taken by virtue of a writ of *feri facias* at the suit of William Willson, and Ann Maria his wife. And also a paper, which it is admitted was prepared and filed by the sheriff as his return to the *feri facias*, and in which the land sold is described as "part of a tract of land called Charles and Benjamin, lying on the north-west side of the Baltimore road, containing two hundred and fifty acres more or less." And all of them describing it as the land of Elisha D. Berry. And the defendant produced a corrected return by the sheriff, of the *feri facias*, on the return day of the writ. That corrected return is full and special, and sufficiently describes the land sold, and entirely supersedes the paper that was first prepared by the sheriff as his return; which paper, if admitted to be imperfect as a return, cannot avail the appellant, as it will not be denied, that

a sheriff has a right, in due time, to correct his return to a *fieri facias*, so as to make it conform to the truth of the fact, whatever that may be, and to give it effect and legal operation; and indeed, it is his duty to do so, not only as respects himself, but all others concerned, and purchasers not less than others, who commit themselves to the accuracy and integrity of sheriffs.

In this case it is not denied, that the correction was in time; nor is it contended, that the return, standing alone, is upon the face of it defective, but it is supposed that there are discrepancies between the return, the inventory and appraisement, and the advertisement of sale, which vitiate the whole proceedings, and render the sale void. With respect to certainty in the description * of the property, we do not perceive the fatal discrepancies that are **344** supposed to exist. The corrected return describes the land levied upon, as the property of Elisha D. Berry, to be "all that part of the tract of land called Charles and Benjamin, which was devised to Elisha D. Berry by his father," with a reference to the will, and states the amount, to which it was appraised, to be \$6,000, referring also to the schedule or inventory. Between the description then of the land levied upon, as given in the return, and the inventory and appraisement, there is no discrepancy, but the land clearly appears to be identical. In the latter, it is described as part of a tract of land called Charles and Benjamin, the property of Elisha D. Berry, containing five hundred acres more or less, and appraised to \$6,000. In the former, as all that part of the tract of land called Charles and Benjamin, belonging to Elisha D. Berry, which was devised to him by his father, stating the amount of the appraised value to be the same as that set out in the inventory and appraisement, and showing, by the reference to that paper, (which is made a part of the return,) the quantity of acres to be the same. The only difference being this, that the return professes to show in what manner Berry acquired title, by reference to his father's will, which the inventory does not. But the two papers manifestly show the land devised to Berry by his father, and the land levied on to be the same; and the same may be said of the advertisement of sale, which is of all the right, title, interest and estate, of Elisha D. Berry, of, in and to, part of a tract of land called Charles and Benjamin, containing five hundred acres more or less, taken by virtue of a writ of *fieri facias* at the suit of William Willson and wife. This paper does not, to be sure, set out the means by which Berry acquired title, but it describes the land seized under the *fieri facias*, as the the property of Berry, by its name and contents, as it is described in the other two papers. And it is difficult to wink so hard, as not to see, that they all manifestly relate to the same land, and describe it with sufficient certainty. But it is not true, that lands taken in execution, must be described in the schedule and advertisement of sale, with technical minuteness. If it were so, it would * perhaps be found that there are few titles in the State, acquired by purchase at **345**

sheriffs' sales, that might not be shaken. The sheriff cannot sell what has not been levied upon, but a general description in the schedule and advertisement of sale is sufficient. The return should regularly, for the security of purchasers, describe the premises with precision; but it is enough if the description be such as that the property sold may be clearly identified. In this case, the land sold was a part of the premises levied upon and advertised, and that part is described in the sheriff's return, in a manner by which it may be sufficiently known and ascertained. But it is contended, that the sale was void, because a part only of the premises seized and advertised was sold, on the ground that the sheriff was not legally authorized to sell a part only, but was bound to sell the whole of the land levied upon. We cannot, however, assent to the proposition. Sheriffs, it is believed, are already sufficiently disposed to sell more than is necessary; and it would be pregnant with mischief to the community, if a sheriff, who lays an execution for \$100, on a tract of land worth \$10,000, should be held to be obliged to sell the entire tract, and could not sell such part as might be sufficient to discharge the debt. On the contrary, we think, that in such a case the sheriff is not only authorized to lay off and sell such a proportion of the land as may be found sufficient to satisfy the debt, but that he ought to do so, and not to sacrifice at auction more than may be found necessary. Or suppose a sheriff having taken in execution an entire tract of land, finds it will sell to a greater advantage if divided and sold in lots, than if sold altogether; and accordingly lays it off into lots, and sells them separately to different persons; would it, in such case be said, that the sale of each lot would be void, because the sale of neither was a sale of the whole? And yet the doctrine contended for here, if maintained, would lead to that length.

We can perceive nothing wrong in the sale and return in this case, and affirm the judgment. *Judgment affirmed.*

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* ANDERSON vs. FOULKE.—June, 1828.

Where land was sold under a decree, and the sale, after opposition by the purchaser, was ratified; but the trustee received neither notes, nor bonds, for the payment of the purchase money; and the period for payment having expired, the Chancellor ordered the purchaser, to pay to the trustees or bring into Court, the amount of the purchase money, and interest, before a given day, or show good cause to the contrary. The purchaser having failed to comply, the Chancellor then ordered an attachment against him, to enforce obedience to his first order. On appeal—*Held*, by the Appellate Court, that under the circumstances of this case, the Chancellor had a right to adopt the proceeding to which he resorted. (a)

(a) Cited in *Richardson vs. Jones*, 3 G. & J. 185; *Farmers Bank vs. Martin*, 7 Md. 345; *Warfield vs. Dorsey*, 39 Md. 303; *Shaefer vs. O'Brien*, 49 Md. 256;

A trustee having sold lands by order of the Court of Chancery, and reported his proceedings to that tribunal, where after objections taken thereto by the purchaser, they were ratified, and the ratification, on appeal, being sanctioned by the Appellate Court, it is no longer competent for such purchaser to contest the propriety or validity of that sale, nor to object, that he was not reported in the usual way to the Court of Chancery, as the purchaser of the property sold.

Where a tract of land is sold, as containing a given quantity of acres, and it is discovered that less is included than was conceived at the time of the sale, a deduction will be made, unless the deficiency shall be such as would have prevented the contract, if known at the time of the purchase; that is, the deficiency appearing to be in that part, which was the chief inducement to purchase. *Per* JOHNSON, Chan. (b)

Boyle vs. Schindel, 52 Md. 6. Where a sale is made under a decree, or order in Chancery, and no bond or security is given for the payment of the purchase money, the purchaser may be compelled to complete his purchase by an order on him in a summary way, to pay or bring the money into Court. *Richardson vs. Jones*, *supra*. But when a bond is given to the trustee for the purchase money, under an order of sale from Chancery, requiring bond to be given, and the sale has been ratified, the purchaser and his sureties cannot be compelled to pay the bond in a summary way, by an order of Court. This constitutes a legal contract to be enforced at law. *Ibid*. Where a trustee reported a sale and on the same day filed a petition alleging the failure of the purchaser to comply with the terms of sale and praying a re-sale at the risk of the purchaser, which order was thereupon passed without giving notice to the purchaser, it was held, 1st. That the first sale having been reported by the trustee, no order affecting the rights of the purchaser should have been passed without affording him an opportunity of showing cause against such order. 2nd. That the order of the re-sale was clearly erroneous, as it was not only passed *ex parte*, but the re-sale was ordered to be made at the risk of the purchaser. 3rd. That such an order could not be passed until the first sale was ratified, and the party still fail to comply. *Schaefer vs. O'Brien*, *supra*. When a party fails to comply with his contract of purchase he may be coerced in three ways. 1st. by attachment; 2nd. by suits at law on his notes or bonds; 3rd, by a re-sale. *Farmers Bank vs. Martin*, *supra*. See also *Gordon vs. Matthews*, 30 Md. 235; *Stephens vs. Magruder*, 31 Md. 168; *McCullough vs. Pierce*, 55 Md. 540; *Brundige vs. Morrison*, 56 Md. 407. When property is re-sold at the risk of a defaulting purchaser, such purchaser is entitled to the surplus proceeds of the re-sale over and above the costs of the second sale and the amount of the purchase money due on the first sale. *Mealey vs. Page*, 41 Md. 172, affirmed in *Earley vs. Dorsett*, 45 Md. 466.

Under Rev. Code, Art. 66, sec. 6, equity has power, on the application of a trustee appointed to sell real estate, to compel the purchaser thereof to comply with the terms of sale by process of attachment, or other execution suited to the case, or the Court may direct the property to be resold, at the risk of such purchaser, and if the proceeds of the re-sale, after payment of the expenses thereof, shall not be equal to the sum originally bid therefor, the Court may order the difference to be paid by such purchaser and enforce such order by execution.

(b) See *Brown vs. Wallace*, 4 G. & J. 479; *Jones vs. Plater*, 2 Gill, 125; *Marbury vs. Stonestreet*, 1 Md. 154; *Stull vs. Hurtt*, 9 Gill, 446; *Slothower vs. Gordon*, 23 Md. 1; *Tyson vs. Hardesty*, 29 Md. 305; *Weems vs. Brewer*, *post*, m. p. 390.

If a trustee, who is directed by a decree to sell a tract of land entire, and at public sale, should sell it at private sale, and in parcels, or in any other manner different from the mode prescribed, and report satisfactory reasons for doing so, and no objection is made, the sale may be ratified. *Per* BLAND, Chan. (c)

If there should be made to appear, either before or after a sale has been ratified, any injurious mistake, misrepresentation, or fraud, the biddings will be opened, the reported sale rejected, or the order of ratification rescinded, and the property again sent into the market, and resold. *Ib.* (d)

To all sales under the orders and decrees of the Court of Chancery the rule *caveat emptor* has been applied. *Ib.* (e)

APPEAL from the Court of Chancery. At March Term, 1822, a decree of the Court of Chancery was passed in a cause, then depending in that Court, between Andrews and Williams, complainants, against Asher Foulke, and others, defendants, directing that the real estate of Stephen Scotton, deceased, or so much thereof as should be necessary, be sold for the payment of the claim of the complainants, and of such other debts of the deceased as should be established to the satisfaction of the Chancellor. Asher Foulke was appointed trustee to make the sale, and directed to give bond, &c.,
347 and after giving notice, &c. * proceed to sell the tract of land mentioned in the proceedings, either entire or in parcels as he should think fit, upon the following terms, to wit: One-third part of the purchase money to be paid at the time of the sale, or on ratification thereof by the Chancellor; one other third part of the purchase money to be paid in twelve months from the day of sale, and the remaining third part to be paid in two years from the day of sale. For the payment of the two last instalments with interest, notes or bonds with security, to be approved by the trustee, to be given. The trustee after the sale, to return to the Court a full and particular account of his proceedings under the decree, with an affidavit of the truth thereof, &c. The trustee reported that "in pursuance of a decree issuing out of the Court of Chancery on the first of April last, by said decree the subscriber was appointed trustee to sell a certain tract of land, late the property of Stephen Scotton, deceased. After having given bond, and advertised the terms of sale in two public papers, agreeably to the directions of the said decree, a public sale was held on the 23rd of July, where there was no more bid than eight dollars per acre, which was not thought sufficient to authorize a sale; and have since sold it on the 28th day of August,

(c) See *Campbell vs. Digges*, 4 H. & McH. 12, note; *Wilson vs. Jessop*, 59 Md. 120.

(d) Cf. *Wicks vs. Westcott*, 59 Md. 272; *Gill vs. Wells*, *Ibid*, 492; *Preston vs. Fryer*, 38 Md. 221.

(e) Cited in *Speed vs. Smith*, 4 Md. Ch. 805; *Lamm vs. Port Deposit*, 49 Md. 242. So held in *Slothower vs. Gordon*, 23 Md. 1.

1822, as may be made appear, for eleven dollars per acre. The land is supposed to contain 140 acres." Signed and affirmed to by Asher Foulke, on the 29th of August, 1822. The Chancellor on the same day passed an order that the sale above reported be ratified and confirmed on or before the 10th of November then next, provided a copy of the order was published, &c. before the 10th of October then next. On the 9th of October, 1822, Samuel Anderson (the now appellant,) exhibited his petition to the Chancellor, in which he stated that Foulke was, by a decree of the Court of Chancery, passed on the 5th of April, 1822, appointed trustee for making sale of the real estate of Stephen Scotton. That the petitioner contracted with Foulke for the purchase of a tract of land called Duvall's Delight, supposed to contain 140 acres at and for the sum of \$11 per acre, and by the trustee's report was returned as the purchaser. That during the treaty between the petitioner and Foulke for the purchase of the said land, Foulke represented a piece of woodland on the north side of the said tract of land as a part * of the said tract called Duvall's Delight. That the petitioner had been informed and believed, that the lines of several neighboring tracts of land run into and took off a great part of the said woodland. That the location of the said woodland was the principal inducement to his purchasing the said tract, and is material and necessary to the possession and enjoyment of the said tract of land. The petitioner, therefore, prayed that the Chancellor would not ratify and confirm the sale as made and reported by the trustee. The Chancellor fixed a day for hearing the petition, on a copy of his order being served on the trustee. He also ordered that a deposition of witnesses, taken before a justice of the peace on three days notice thereof to the parties, be read in evidence at the hearing. On the 4th of December, 1822, the trustee by his answer to the petition, stated, that he never showed to the petitioner the outlines of the part of Duvall's Delight of the estate of Stephen Scotton, and that the petitioner knew the outlines of the said tract as well as the trustee did. That on the day on which the petitioner contracted with the trustee for part of Duvall's Delight, the estate of the said Scotton, and entered into a written agreement with the trustee for the purchase of and payment for the same, (as by the agreement exhibited would appear,) Beale Duvall was surveying his part of Duvall's Delight, on which the estate of said Scotton binds in part, and the lines of said Duvall's part of Duvall's Delight, on which Scotton's estate binds, were shown to the petitioner by the surveyor of the county, and others. The petitioner did not for the time, nor for a long time after, object to the running of Duvall's part of Duvall's Delight, as would appear by the depositions of certain witnesses exhibited. That there is no timber land, and but a small quantity of brush-wood on Scotton's part of Duvall's Delight, adjoining the said Duvall's part of said tract; and that no other part

of the outlines of the said part of the tract, the estate of Scotton, had been sold to the petitioner. Nor did the trustee believe that any person had, since the petitioner's contract with the trustee, surveyed the same for the petitioner; that if the petitioner had acquired any new information of the location of the estate of Scotton, he might have obtained the same *information (independent-

349 ly of the trustee,) previous to his contract for the purchase.

The trustee exhibited with his answer the depositions of sundry witnesses, and the agreement entered into with him by the petitioner on the 28th of August, 1822, stating that Foulke, the trustee, had sold to Anderson, the petitioner, his heirs and assigns, "all that tract of land, late the property of S. Scotton, deceased, supposed to contain one hundred and forty acres, be it more or less, at eleven dollars per acre; he the said Anderson, is to pay one-third of the purchase money down, and the remainder in two equal annual instalments, with interest; for which notes are to be given with approved security, and when paid Foulke is to make and execute a title or deed to him the said Anderson, his heirs and assigns, forever."

The petitioner also exhibited the depositions of sundry witnesses, taken in pursuance of the order of the Chancellor. A survey of the land sold, and other adjoining lands, was made under the order of the Chancellor, by a surveyor of the county, and a plot thereof returned.

JOHNSON, C. (March Term, 1823.) It is alleged by the petitioner, that Asher Foulke, the trustee under a decree for the sale of the real estate of Stephen Scotton, sold to the petitioner part of a tract of land called Duvall's Delight, supposed to contain 140 acres, at eleven dollars per acre; "that at the time of the sale, the trustee represented a piece of woodland on the north side of the said tract of land, as part of the said tract called Duvall's Delight;" that he believes, "that the lines of several neighboring tracts of land run into and take off a great part of the woodland;" and that the "woodland was the principal inducement to his purchasing." As the property did not, according to the allegations contained in the petition, correspond with the representation made by the trustee, it is prayed that the sale may be set aside or annulled.

Preparatory to a decision, an order passed for laying down the land that was sold, as well as any other land that might be deemed by the parties necessary for the illustration of the matter in controversy.

On examining the plot returned by the surveyor, it appears that the trustee has laid down the land which he sold to the *peti-

350 tioner, and this location is not counterlocated, and, therefore, admitted to be the land purchased. The quantity is $141\frac{3}{4}$ acres, of which three roods are within the lines of a deed executed by Charles Carroll to Humphrey Hogan, on the 16th of July, 1723.

It seems to appear that Charles Carroll was the owner of the whole of the tract of land, which was conveyed by him to different persons; and before it can be known whether the three roods are the property of those claiming under Hogan, or belonging to the estate of Scotton, it is necessary to see the other transfers; and even if Hogan's title is the eldest, yet a title to it may have been acquired by possession; for as it is laid down as part of the land sold, it is to be presumed Scotton was in possession at the time of his death.

Where a tract of land is sold, and it turns out to be materially variant from the representation, the contract may be set aside. Where a tract is sold as containing a given quantity of acres, when it is discovered that less is included than was conceived at the time of the sale, a deduction will be made, unless the deficiency is such as would have prevented the contract, if known at the time of the purchase; that is, the deficiency appearing to be in that part which was the chief inducement to purchase. But in this case, in every respect the petitioner has failed to support his allegations. He has not proved that the trustee represented to him, that he sold "a piece of woodland as part of Duvall's Delight," which is included in the lines of "neighboring tracts." He has laid down no interfering tracts whatever; nor if the right of the trustee to sell three roods did not exist, and it could not exist unless it was owned by Scotton at the time of his death, has he proved that those roods of land were the inducement to the purchase?

The sale made by the trustee is, therefore, ratified and confirmed, and the petition dismissed with costs.

From this order the petitioner appealed to this Court.

At June Term, 1825, no objections being made to the Chancellor's order, it was *affirmed nisi*.

Afterwards, on the 12th of January, 1826, Foulke, the trustee, (now appellee,) by his petition to the Chancellor, after * stating the several facts as herein before mentioned, stated that since **351** the decision of the Court of Appeals on the said appeal, he called on Anderson, the purchaser, and informed him of the said decision, and served a copy thereof on him, and requested him to pay him, and comply with his engagements; but that instead of so doing, he utterly refused, &c. That the time of the payment of the last instalment had long since passed, and Anderson had not paid the purchase money. Prayer for an attachment of contempt, &c. On the 13th of January, 1826, the Chancellor passed an order that an attachment issue as prayed by the foregoing petition, returnable to the first day of March Term then next. The attachment accordingly issued, and was served on Anderson, who appeared, and, by his answer to the petition, stating that on an examination of the proceedings in the original cause, it did not appear by the trustee's report, that the respondent was the purchaser of the land therein mentioned; and he was

advised, that in consequence of the irregularity of the proceedings a good title to the premises could not be conveyed to him by the trustee. That he had not been put into possession of the land, and he believed the trustee could not give him possession, the same being in the occupation of a certain Joseph Marriott. He denied the statement of the petitioner that a copy of the decretal order of the Court of Appeals had been served on him. That he was unable to comply with the terms of the decree. That he was advised that the Court of Chancery had no power to give the petitioner the relief he asked.

The petitioner then prayed the Chancellor that Anderson be committed to jail for the contempt of the Court, by him committed in not having paid the money due by him on account of the land purchased by him from the petitioner, as trustee, &c.

BLAND, C. (17th of March, 1826.) In this case the petition and representation of Asher Foulke, the trustee, and the answer of Samuel Anderson, after hearing counsel on both sides, were read and considered.

It does not sufficiently appear that Anderson has been called upon, under any order of this Court, commanding him to pay to the trustee, or bring into this Court, the sum of money, * which he, as purchaser, contracted to pay for the land sold to him, as mentioned in the proceedings; therefore, without intimating any opinion as to any other matter urged or suggested by the counsel on either side, the Chancellor conceives that Anderson must be discharged from his present detention.—Ordered, that he be discharged, &c. Also ordered, that he pay unto the trustee, or bring into Court, the sum of \$1,540, together with interest thereon from the 28th of August, 1822, until paid, or brought in, being the amount of the purchase money of the land sold to him, as in the proceedings mentioned, on the 17th of April next, or show good cause to the contrary; provided a copy of this order, together with a copy of the said petition of the trustee, filed on the 12th of January last, be served on the said Anderson, on or before the 25th instant.

On the 25th of March, 1826, Foulke, the trustee, filed a copy of the order and petition above mentioned, with an affidavit of the service thereof on the said Anderson, on the 25th of March, 1826.

BLAND, C. (May 12th, 1826.) This case came on to be heard on the order of the 17th of March last, by which the purchaser, Samuel Anderson, was commanded to pay the purchase money, or show cause why he should not be made to do so. The parties were heard by their counsel, and the proceedings have been read and considered.

This application has been assailed as a novelty—altogether without precedent here, and having few even of English origin, and those few of very late date, and long since our Revolution. It has also been opposed on the ground, that the parties interested can only obtain

redress, if indeed they are really entitled to any, by a bill in equity or a suit at law; in which, as it is said, the whole case can be fully investigated, the rights of the parties conclusively established, and complete justice done to both.

The defence taken in this case, if sustainable in all its consequences, appears to be destructive of some of the most valuable and important powers of this Court. Controverted points, arising between the Court's trustee for the sale of property, and the purchaser, have frequently been brought before me, since I came * here; but in each instance they have been treated as insulated matters of mere practice, and have passed off in that way. This case has assumed a more grave aspect. I shall, therefore, now review the subject more at large, and upon general principles. **353**

On considering the nature of sales under the authority of the Court of Chancery, the first inquiry which suggests itself is, who are the real parties to the contract? This very idea of a contract implies, that there is one party able and willing to contract, and another to be contracted with. It implies a perfect capacity and free will in each of the parties to the agreement. To a contract of sale, made under a decree of this Court, neither of the litigating parties to the suit can be considered properly as the vendor; although they, with others, such as creditors, who may be allowed to come in afterwards, are very materially interested in the sale. The plaintiff cannot be considered as the vendor; because, oftener than otherwise, he has no title, and always states his inability to sell; and prays the Court to decree, that a sale shall be made. The defendant cannot be the vendor; because he always positively refuses to part with his property unless forced, or sanctioned in doing so by the power of the Court. If then neither of the litigating parties can be separately deemed to be the vendor, it is clear, that they cannot both together be so considered.

But such sales are always made by an agent; in England by a master, in this State by a trustee. Private contracts may be made and executed in person or by attorney; but the attorney is never considered as one of the contracting parties—he exercises no will or power of his own—he is merely the medium or conduit through which the will of the contracting party is expressed. The master or trustee is the mere attorney of the Court, acting under a specially delegated authority. And, in no case is a master or trustee authorized more than to accept an offer or proposal to contract, which is of no sort of validity unless it be accepted, ratified and confirmed by the Court. It is the Court itself, for the benefit of all interested, therefore, who is the vendor in such cases.

But it may be said, if the Court be the vendor in sales made by its trustee, would it not also follow, for the same reasons, that a Court of common law must be considered as the vendor in * sales made under its writ of *fieri facias* by the sheriff? The cases **354**

are essentially different. The writ of *fiery facias* is a general authority or command to the sheriff to make so much money by sale from the personal estate of the defendant. By this writ the executive officer of the Court is commissioned to seize the whole, any part, or so much of the defendant's personal estate as may be necessary to raise the specified sum of money. No particular articles of property are ever designated. By the statute this power, given by the common law writ over personal estate, has been extended over real estate. And the same writ, and the same principles of law, now apply to both species of property.

The real or personal estate with which the Court of Chancery deals is, however, always in one form or other distinctly specified in the proceedings; and the sale is made only, because the Court is asked to have it made to accomplish the objects of the suit. In the proceedings at common law, from the commencement, to the *fiery facias*, no property is designated. At common law, the terms and manner of sale are regulated by law; in Chancery they are regulated by the Court. At common law if the sheriff, in seizing the property and making the sale, conforms to the established regulations applicable to all cases, (and he can sell in no other manner,) the sale is final and valid so soon as it is made. But in Chancery the sale is, in no case, binding and conclusive, until it has been expressly approved and ratified by the Court. If it be made in a manner wholly different from that prescribed by the Court, it may yet be sanctioned; or, if it be made in all respects conformable to directions, may still be rejected. And hence, it is obvious, that in the one case it is the Court of Chancery who is the real vendor, and in the other, the sheriff or executive officer of the Court.

In an English case arising on a sale under the authority of the Court of Chancery, decided in the year 1721, in which the question was, whether the purchaser should be compelled to complete his purchase or not, this matter is spoken of as one perfectly settled. "Upon a contract betwixt party and party, (says the Chancellor,) the contractor would not be decreed to pay an unreasonable price for
355 an estate; so neither ought the * Court to be partial to itself, and do more upon a contract made with itself, or carry that farther, than it would a contract betwixt party and party. On the other hand, the Court might be said to have rather a greater power over a contract made with itself, than with any other." (a) And in other cases, of recent date, where the subject has been brought into view, the Court has, in like manner, been spoken of and considered as the vendor.

In a controversy relative to a trustee's sale, under a decree of this Court, which was frequently brought before Chancellor HANSON, and appears to have been much considered by him, he says, "With re-

(a) *Savile vs. Savile*, 1 P. Wms. 745.

spect to sales under the authority of this Court, the Chancellor thinks himself bound to act as if the property were his own; or held by him in trust. That is to say, he thinks, that reasons which would induce him as proprietor or trustee to set aside a sale made by his agent, should determine him as Chancellor to refuse his approbation to a sale made by a trustee." Hence it is evident, that he considered the bidder or purchaser as a contracting party on the one side, dealing with the Court as the contracting party on the other, and who was, in fact, the vendor. That the Court was to be considered as the proprietor and principal, and the trustee as the mere agent, having no right or power whatever, other than as a mere attorney. Hence it is clear upon principle, and also upon authority, as well in England as in this State, that the Court of Chancery, and not its trustee, is in all cases to be considered as the party contracting, or as the real vendor.

The manner of sending property into the market, as well as the mode of sale, generally adopted in this State, differs perhaps, in some particulars, from that of other countries. The form of ordinary sales of merchandise by auction is the same in this State as in England. But the mode of making a sale of property under the authority of the Court of Chancery in England is somewhat different. In such case the estate is sold before one of the Masters in Chancery, who, after the particulars of sale are prepared, corrects and sanctions it by his signature, to authorize the insertion of the advertisement in the *Gazette*. After which the Master, with the approbation of the parties, * fixes a time of sale; and the second advertisement, **356** (for there are always two,) is then inserted in the *Gazette*, stating the time of sale. On the day of sale, a particular of the property or lots to be sold, is prepared under the authority of the Master. The property or lots successively are put up at a price offered by a person present, and every bidder must sign his name, and the sum he offers, in the space on the particular under the lot for which he bids. The best bidder is of course declared to be the purchaser—the biddings are closed, and he is reported as such by the Master, to the Court; and if the sale be ratified, the contract is complete. In this State the manner and terms of sale are particularly prescribed in the decree, and the trustee is directed to conform accordingly. The sale may be directed to be either private or public. If the latter, it is conducted in the form of an ordinary auction; the bids are received verbally, and the highest bidder is reported as the purchaser, by the trustee.

All the several forms of sale are, however, mere modal regulations; each of them have their advantages and their inconveniences; but none of them can in any way materially affect the parties to the contract, or its terms, stipulations, or obligatory force. The English Court will not suffer the property to be sold in any manner different from that prescribed before the Master. In this State these modal

regulations are not regarded as of so much importance; and are, therefore, not so strictly adhered to. If a trustee, who is directed by the decree to sell the tract of land entire, and at public sale, should sell it at private sale and in parcels, or in any other manner different from the mode prescribed, and report satisfactory reasons for doing so, and no objection is made, the sale may be ratified.

But whatever variety or difference may exist as to the mere modality of sale, the intentions and general objects are the same everywhere, and in all cases. The benefit of the interested parties, for whom the Court makes the sale, is always and chiefly regarded. The highest price that can be had, under all circumstances, should be obtained; and the sale should be in all respects a fair and honest one. These are the ends in view. To attain them, in England, if after the biddings are closed, any one else will come in and offer a
357 much higher price, the *biddings will be opened, and the additional offer will be accepted. This phrase of "opening the biddings," which, in the English books, occurs so frequently, means no more than a further suspension of the sale, and a continuance of the property in the market. In this State there has been no instance of opening the biddings or suspending the sale merely to let in another and a higher bid, and for no other cause. But in this State, as well as in England, if there should be made to appear, either before or after the sale has been ratified, any injurious mistake, misrepresentation or fraud, the biddings will be opened—the reported sale will be rejected, or the order of ratification will be rescinded, and the property again sent into the market and resold.

As to sales under the authority of this Court, it has long been well established, that any circumstances showing that the sale was injurious to the parties concerned; or that a better sale might reasonably and probably have been made, is sufficient to prevent a ratification. It is not incumbent on the party objecting to show favoritism, or an improper motive, although such proof would furnish conclusive inducement for rejecting the proposed sale. But where the property of infants was to be sold, even a strong doubt of the propriety of the sale has been deemed sufficient to prevent its ratification. And if, in any case, the trustee reports, that there was an error, mistake, misunderstanding, or misrepresentation, as to the terms or manner of the sale, it will be rejected at once, and a re-sale ordered without further inquiry. Objections are seldom, or ever made by any others than those directly interested. But the Court, in acting as proprietor, or as if the property were its own, and in deciding on the merits of a sale, will avail itself of information from every quarter from which it may be derived; that is, from the original parties to the suit, or the creditors for whose satisfaction the sale is to be made, or from any other person. In such cases, however, much more attention will be paid to objections coming from those who are interested than from volunteers. But

it is not unusual, with the consent of all parties interested, to ratify the sale immediately on its being reported, without giving any notice, or time for objections to be made by others.

* Where land has been sold under the authority of this Court by the tract or in parcels, containing so many acres **358** "more or less," the sale will not be rejected, unless the deficiency, should it be objected to on that account, be material and considerable. It has been established as the law of the land office, by the Proprietary's instructions, as far back as the year 1684, that the words "more or less," in every patent grant, shall be taken to amount to ten per cent. over or under, and no more. But in this Court, and in relation to private contracts, or to sales under a decree, the words "more or less," added to the statement of the quantity, has never yet been fixed by any decision. Each case appears to have been governed by its own peculiar circumstances. Where the deficiency was material in that part which was the inducement to the purchase, or the like, the sale has been set aside. But where the deficiency has been such as not materially to vary the contract, and the purchaser was still willing to purchase, a proportionable deduction has been made. But where land is sold, not by the tract or in a body, but by the acre, or in lots, at so much per acre; and the alleged number of acres, or the location and description of the lots should not be known or admitted, a survey will be ordered, if required; by which means all difficulties, as to the quantity and location of the land, and the amount of the purchase money, may be entirely removed.

In England, it would seem to be usual, in sales under the authority of the Court, to offer a good title to the bidders; and hence the references to a Master, at the instance of a party or of the purchaser, of which we read so often, to ascertain whether a good title can be made or not. But in this State it has been always the established law of the Court, in such cases, to sell all the right and title of the parties to the suit, whatever that may be, and nothing more. To all judicial sales under orders or decrees of this Court, the rule *caveat emptor* has been applied. And, consequently, no examination into the title, after the sale, is necessary or can be called for by the purchaser, whatever may be either its patent or latent defects. But if the trustee makes any promise or representation to the bidder, before the sale, that the estate shall be, or is clear of all incumbrances, or that the title is better or different from that to be * traced from the proceedings, and any such claims should afterwards **359** appear, or be set up, the sale will be annulled. But this relief would be granted to the purchaser on the ground of misrepresentation or fraud, and not on that of a mere defect of title, as in cases between party and party.

After a sale has been ratified, the Court, in England, will not rescind the order and open the biddings without strong induce-

ments. So in this State, after a sale has been made and reported, and before it has been ratified, it is open to all objections. And, if objected to, unless it should, on examination, turn out to be in all respects fair and proper, it will not be ratified. But, after it has been confirmed, the purchaser can only obtain relief by bill or petition; and thus calling the litigating parties to the suit again before the Court to answer, repel, and remove the objections, which he may so make, if they can.

It is usual, in England, at the time of bidding, or having the biddings opened to be let in as a higher bidder, for the proffering purchaser to make a deposit of a considerable amount of the purchase money by way of earnest. And this deposit is sometimes said to be the only hold which the Court has upon the purchaser; and it is, in truth, the only hold which it can have of him in that stage of the proceedings; for he cannot be quickened before the report is confirmed absolutely. And should he turn out to be insolvent, it is the only effectual hold the Court will ever be able to take of him. Consequently, the exacting of a deposit from the purchaser is there considered as a useful and proper precaution. If the purchaser refuses to comply with his contract, the Court will, if required by a party interested, inquire whether he is able to pay; and if it should appear that he is insolvent, or has not the means of complying with his contract, the sale will be annulled, the deposit forfeited, and a re-sale ordered. For even at common law, and between party and party, if, after being requested, the vendee does not, within a convenient time, come and pay for and take away the goods purchased, the agreement will be dissolved, and the vendor at liberty to sell them again to any other person. If, however, the purchaser is able, and fails to comply, the Court will not suffer itself to be baffled, but will, at the instance of a party interested, compel the purchaser to comply by process of attachment for contempt.

360 * The exercise of a similar summary power of coercion by this Court against a tardy or unwilling purchaser after the confirmation of the sale, it has been repeatedly and strongly urged, is one which is not within the scope of its jurisdiction. The exercise of such an authority, it has been urged, is a very recent, and equivocal extension of the power of the Court of Chancery of England. It sometimes has happened, that a necessary and important power, after having been called into action and producing all the beneficial effects required or expected, is suffered to slumber so long as to drop almost into oblivion. Such, it would seem, has been, in some degree, the fate, both in England and in this State, of this power of coercing a purchaser under a decree, to comply with his purchase.

In the year 1721, the Court of Chancery of England, was pressed by a party interested to force a purchaser under a decree, to complete his purchase, and not to let him off by a mere forfeiture of his deposit, although it amounted to nearly one-tenth part of the pur-

chase money. It was not even intimated, that the Court had not the power to do so. But it would seem, that in that case, the purchase was made at a time when the nation was under a general delusion as to the quantity of money in circulation, and the value of property, and the purchaser had been thus induced to give an unreasonably high price for the property in question. The Chancellor, without expressing the least doubt as to his power to use coercion in a summary way against the purchaser, or saying anything distinctly upon that point, said that it was punishment enough if the purchaser was made to lose his deposit, and satisfaction enough to the seller if he was to have the benefit of keeping it. (a) Hence it may be inferred, that the Court considered itself as having the power to proceed against the purchaser, but that it did not think proper to do so in that case.

One of the most accurate of the English reporters gives us the following as the words of Lord Hardwicke, delivered in the year 1748, in relation to this subject: "The present, says he, is a judicial sale of the estate, which takes it entirely out of the Statute (of Frauds.) The order of the Court was not interlocutory, but made part of the decree; as it always is on * the matter reserved, though made at another day; and it includes, as well the carrying the purchase into execution, as the establishment of the charity amounting to a decree for the conveyance of the estate on one side, and payment of the money on the other; who might be prosecuted for a contempt in not obeying that order. And it is stronger than the common case of purchasers before the Master, who are certainly out of the statute; nor should I doubt the carrying into execution against the representative, a purchase by a bidder before the Master without subscribing, after confirmation of the Master's report, that he was the best purchaser; the judgment of the Court taking it out of the statute. But even in common cases this question may arise; as if the authority of an agent, who subscribed for the bidder, not being admitted, cannot be proved. Yet if the Master's report could be confirmed, it should be carried into execution, unless some fraud; for this is all exclusive of any defence that may still be set up on the other side." (b) 361

In this case the testator had bequeathed a certain sum of money to be invested for charitable purposes, and on a reference to the Master to propose a scheme of investment, he had reported, that the money should be laid out in the purchase of certain lands. The report had been confirmed, and the object now was to obtain a specific performance of the order confirming the Master's report. As to which point Lord Hardwicke is reported to have said, "the material consideration is, whether, as circumstances now stand, considering

(a) *Savile vs. Savile*, 1 P. Wms. 745.

(b) *Attorney-General vs. Day*, 1 Ves. 218.

the events and alteration of rights thereby, the Court ought to carry it into execution? The general rule certainly is, that this is discretionary in the Court, but will not hold in the present; for that is generally in cases, where there may be an election of two remedies, by coming here for a specific performance, or by action at law; whereas here there can be no remedy at law; all arising under the acts of this Court, from that order amounting to a decree. So that if this Court does not carry it into execution, it cannot be at all; yet whether other remedy or not, if there are strong and material objections against it, the Court ought not to do it."

362 *Hence it appears to have been the decided opinion of Lord Hardwicke, long before our Revolution, not only that a purchaser, after the sale had been ratified, might be compelled to pay the purchase money by process of attachment for contempt; but there was in fact no other remedy, since it was clear, that no action at common law could be maintained against the purchaser grounded merely on the order in Chancery confirming the sale. And this case was cited by Lord Eldon in 1805 with approbation, as being entirely sound in its principles. (a)

A doubt was expressed upon this subject in a case on the equity side of the Court of Exchequer in the year 1793, when, on the Court being referred to a similar proceeding in Chancery which had taken place in the year 1787, an order was made, after confirmation of the sale, that the purchaser should be compelled to complete his purchase. (b) But in the year 1808, the instances in which the Court of Chancery had exercised such a power seems to have been again almost forgotten. The Chancellor expressed some doubt, but on being referred to a case which arose in the year 1791, he made the order, that the purchaser should pay in his purchase money within a fortnight, or stand committed; observing, that the principle required it equally in the case of a purchaser, who could not be permitted to baffle the Court, and disobey an order, more than any other person. (c)

From these authorities it appears to have been the settled law of the English Court of Chancery long before, and ever since our Revolution, that on a purchaser's failing to comply, the Court would, on application, after the ratification of the sale, compel him to complete his purchase by process of attachment for contempt.

But it has happened in this State as in England, that the evidence of the existence of this power, so important and so necessary to the jurisdiction of the Court of Chancery, has been many times almost forgotten, and the propriety of the power itself has been as often doubted or opposed. There is no instance in this State of a deposit

(a) *Ex parte Minor*, 11 Ves. 562.

(b) *Cunningham vs. Williams*, 2 Anstr. 344.

(c) *Lansdown vs. Elderton*, 14 Ves. 512.

ever having been exacted of a * bidder before the ratification of the sale; and, therefore, if a purchaser cannot be coerced by process of attachment, this Court has no hold of him; nor can it ever take hold of him, in any manner, so as to prevent him from making a mere sport of its decrees. **363**

Some five and twenty years ago, it happened, that a purchaser under a decree of this Court became a bankrupt; and the solicitor, under an impression that relief could only be had by a regular suit, brought a bill in which it is stated, that the land was sold on a credit, and bonds taken of the purchaser, with a surety, to secure the purchase money; that the bonds were, by order of this Court, assigned by the trustee to the complainant; that the purchaser had been regularly declared a bankrupt; that the surety was insolvent. The purchaser and his assignee only were made defendants. The bill prayed, that the sale might be annulled, that the bonds might be cancelled, and for general relief. The assignee answered and admitted the facts, and the bill was taken *pro confesso* against the purchaser. Upon which the Chancellor in his decree of the 7th of July, 1808, concisely observes, that, "although the complainant might obtain relief in another way, and the neglect or refusal to pay money due for property sold is not alone a sufficient ground to set aside a sale;" yet considering the circumstances of that case, the sale was annulled and the bonds cancelled as prayed. In this respect, there are but two modes of proceeding in Chancery, the regular and the summary way. The other way of which the Chancellor speaks, in this regular case by bill, must, therefore, be understood to mean the summary way by petition for process of attachment against the purchaser, or for a re-sale grounded on the equitable lien; which latter must have been that other way particularly alluded to. For, he certainly could not have alluded to an action at common law on the bond against this bankrupt purchaser, and his insolvent surety.

In the year 1821 a case occurred in this Court in which the party interested applied for, and actually obtained relief in that other way alluded to, as it is believed, by the Chancellor in his decree of 1808. After the ratification of the sale, the purchaser had neglected and refused to pay the purchase money. Upon a petition of the trustee representing the fact, the Court passed * an order commanding the purchaser to pay by an appointed day or show cause, **364** or on default an attachment would be ordered. The party made default, and an attachment was ordered. After which the money was paid.

The defence of the purchaser in this case, is that the parties can only obtain redress by bill in equity or a suit at law. He has already by petition prayed relief of this Court; and after having obtained its decision in that form, and had that decision submitted to the revision of the Court in the last resort, it surely ought not to be expected, that these tribunals would again consider and adjudicate upon

that cause of controversy if presented in a new shape, and merely put into the form of a suit by bill. The jurisdiction of this Court over this matter was as extensively and beneficially exercised on its being presented by petition as it could have been in any other way; and the mode by petition is certainly the most usual and proper, if not the only one in which it ought to have been presented.

In this case every objection which this purchaser chose to make, and, no doubt, every one which he thought could be made, with any degree of plausibility, against the ratification of this sale, has been made, fully and maturely investigated, considered and decided upon. And, after all, the sale has been ratified by this Court, and that judgment affirmed by the Court of Appeals. The contract between this Court and this purchaser is, therefore, now absolute, complete, and of record. But now, in answer to an order calling on him to pay the purchase money, he says, that relief, or the means of forcing him to pay, can only be obtained by bill in equity, or a suit at law. A bill in equity in this Court would only be going over the same ground, that has already been gone over. It would be an idle repetition, an unnecessary and improper proceeding; and, therefore, cannot be allowed. This purchaser stands charged by the record and proceedings, now here, as the debtor of this Court, for the benefit of certain of its suitors, to a certain amount upon a judicial sale and contract that has been duly investigated, and absolutely ratified and confirmed.

But it is said a suit at law must be brought upon this contract. By whom must it be brought? Was a suit at law, grounded merely upon an order in Chancery ratifying a sale made under * a
365 decree, ever before heard of either in this State or in England? Lord Hardwicke, as we have seen, has expressly declared, that there can be no remedy at law where all the contract arises out of the acts of the Court amounting to a decree. But this Court is to be regarded as the vendor; and as no bond or note has been taken from this purchaser, which could enable the parties interested to put their claim against him into the common law form and modality of an action at law, how, or in what manner is such a suit to be brought? Must they bring an action of debt, of assumpsit, or a special action on the case?

In all cases of this sort, where property has been sold to pay debts, or for other purposes, and no bonds or notes are taken, there seems to be an insuperable difficulty in making proper parties to try the right at law to the whole purchase money, or to any dividend of the proceeds, either as against the purchaser, or any one or more of the litigating parties to the suit in equity. The powers of the trustee, if he takes no bonds or notes, cease with the ratification of the sale, as to all the purposes of a suit of law. The decree clothes him with no power to sue at law; and, if it did, or this Court were specially to direct him to sue, it must put into his hands the cause of action, the

evidence of the debt, with its own order. The action must then be grounded upon an order of this Court, and instituted in the name of its agent. It would be as if one Court were to bring suit upon its own judgment in another Court. Could such an action be sustained? I conceive it could not.

Chancellor HANSON, in an order of the 2d of May, 1803, in speaking of a contest between suing creditors about a dividend of the proceeds of their deceased debtor's estate, says, "he had never thought it necessary in case of any disputed claim to send out an issue, or to refer the party to an action at law. Indeed it would be difficult, in most cases, to ascertain the proper parties for an issue. The executor or administrator surely would not be compelled, without being a party, to act as defendant on the trial of the issue. However, in all cases where a claim depends on a single fact or facts strongly litigated, and of difficult investigation, the Chancellor conceives, that in some manner an issue ought to be tried." The Chancellor may control the parties to the suit in equity, so as to compel them * to submit to the trial of an issue at law in any form he may dictate. But, if a purchaser cannot be proceeded **366** against here, he certainly cannot be controlled at law. Upon the whole, it seems to me clear, that there can be no remedy against a purchaser at law independently of his bonds.

It seems to be an opinion of some, that there was a distinction between sales for ready money, and sales on credit where bonds or notes were given for the purchase money. But, as regards the purchaser it is difficult to conceive how his liability, and the nature of his obligation, can be substantially varied by the single circumstance of the purchase money having been made payable on the day of the ratification of the sale, or one day, or one month, or one year, after that day.

When the term of credit has expired, and the purchase money is actually due and demandable, it would seem necessarily to follow, that the payment may be enforced as in all other cases—by any form of legal or equitable proceeding by which compliance with such a contract might be enforced. And if the process of attachment might have been used to enforce a compliance, if payment had been stipulated to be made on the day of the ratification, it certainly might be used for the same purpose, at any time after when the money became due; because such a mode of proceeding grows out of, and is incident to the nature of the contract between the Court and the purchaser, and cannot be affected by any stipulation as to the mere time of payment. It is a mode of proceeding necessarily incident to such a contract; because every particular of it is a matter of record; and that too, in a Court peculiarly fitted and competent to relieve against any accident, mistake or fraud, that has happened or may be discovered. Such a contract is not within the Statute of Frauds; and there is nothing left open for litigation or trial before another tribunal,

or even before this Court, which cannot be fully and satisfactorily inquired into and determined in the most summary way. The form and nature of the contract precludes controversy, and supersedes all trial. There is, however, one, and but one question arising out of it left open, and that is, whether or not the money has been paid as stipulated?

367 * But when a sale has been made on credit, and bonds have been taken to secure the purchase money, it has long been the established practice, after the day of payment has elapsed, to sue upon the bonds; which shows, as it is said, that they alone are looked to, and that all other modes of proceeding have been tacitly waived. But the bonds, in such cases, are intended only as an accumulation of the security, or as an additional assurance. And it would be contrary to all the analogies of the law to construe the taking of one security into an abandonment of another, where there was no incompatibility in the existence of both of them together.

Thus it has been held, that although the statute requires the party who sues out a commission of bankruptcy to give bond, with surety, to answer to the party who may be injured thereby, it does not deprive the party injured of any remedy at common law, other than upon the bond. He can, it is certain, have no more than one satisfaction for the injury, but to obtain that he may sue either at common law on the special circumstances, or upon the bond. So the importer of merchandise becomes thereby a debtor to the government for the amount of duties imposed by the Act of Congress. But the law indulges the importer with a credit, on his giving bond for the duties; yet the giving, or not giving a bond, does not supersede the right of action which accrues to the government by operation of law on the importation. The government may sue the importer on such legal liability, considering him as its debtor, or it may sue upon the bond, if one has been given. They are considered as two assurances, affording two remedies, or modes of obtaining one satisfaction. So also a receiver, appointed by the Court of Chancery, is always required to give bond, with surety, to account. But in such case the Court may either proceed by attachment against the receiver alone, or upon the bond.

In all these, and other like cases, the existence of the two securities, and the two remedies, being perfectly compatible, the one with the other, it has never been held that the taking of one amounts to a tacit waiver of the other. And, consequently, the taking of bonds or notes with or without surety, of a purchaser under a decree, cannot, in any case, be construed as an abandonment of the right to proceed against the purchaser * alone, by attachment, to enforce the payment of the purchase money, after it has become due, and after the sale has been ratified.

368 But if the parties chose, as they may, to have the bonds or notes, which have been taken of the purchaser, assigned to them in

satisfaction of their claims that have been established; or to have the trustee directed to proceed against the purchaser, and his sureties, in order to fix their liability upon them by a judgment at law, and in that way to recover the purchase money; suits may be brought upon the bonds or notes by the assignee or the trustee, according to the uniform and long established course, where such has been the choice and object of the parties.

It is a clear and well settled principle of this Court, that where property has been sold under a decree, the Court, as the vendor for the benefit of those interested, retains an equitable lien for the payment of the purchase money. The most usual way of enforcing this lien has been by petition of a party interested setting forth the facts, and praying that the property may be resold to pay the whole or balance of the purchase money. And a sale will be ordered accordingly at the risk of the purchaser. The proceedings, in such cases, are almost always informal and summary. The vendor under a decree, therefore, holds two securities for the payment of the purchase money; one is this equitable lien, and the other is the personal liability of the purchaser. It is conceded on all hands, that the equitable lien may be enforced in a summary way? Can there then be any conceivable solid reason why the personal liability should not also be enforced in a summary way? If it could not, there would be a gross incongruity in the rules of the Court. But it is not so; the personal liability may be enforced in a summary way, and there is a perfect harmony in the rules and principles of the Court.

Upon the whole, it is my opinion, that the purchase money of property sold under a decree, after the sale has been ratified, may be recovered, either by an order and process of attachment of contempt against the purchaser himself, to compel him to complete his purchase after the purchase money has become due; or by a re-sale of the property, grounded on the subsisting * equitable lien; or by an action at law against the purchaser, and his sureties, upon the bonds or notes given by them for the payment of the purchase money.. Ordered, that no good cause having been shown against the order of this Court of the 17th of March last, the same is confirmed and made absolute: Also ordered, that an attachment issue against the said Samuel Anderson to enforce obedience to the said order, returnable to the next term of the Court.

From which order Anderson appealed to this Court.

The case was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and ARCHER, JJ.

S. Pinkney and *Magruder*, for the appellant, contended, 1. That as he never was reported to the Court as the purchaser of the property, he cannot be compelled to complete the contract mentioned in the case.

2. That a good title cannot be conveyed to him in consequence of the irregularity of the proceedings in the original cause.

3. That the Court of Chancery has no power by a summary proceeding to compel a purchaser from a trustee under its decree to complete his purchase.

4. That the property being in the possession of a third person, and the trustee unable to give possession, the purchaser was not obliged to perform his contract until the trustee was prepared to deliver possession.

5. That the contract should have been annulled in consequence of the purchaser's inability to comply with the terms of sale.

6. That the sum of money to be paid for the land never has been ascertained. It was a sale at \$11 per acre, and the quantity never ascertained, which must be done, before any process, in the nature of an execution, can be issued.

In their argument they cited *Savile vs. Savile*, 1 P. Wms. 745; *Attorney-General vs. Day*, 1 Ves. 218; *Cunningham vs. Williams*, 2 Anstr. 345; *Lansdown vs. Elderton*, 14 Ves. 512; *Snowden vs. Journey*, per JOHNSON, C.; *Pinkney, (Trustee,) vs. Munroe*, per JOHNSON, C.; *Morton vs. Tongue*, 6 H. & J. 23; *Sugd. Ch. 2*; *Brasher's Ex'rs vs. Cortlandt*, 2 Johns. Ch. 506.

Boyle, for the appellee, cited 1 Newl. Ch. Pr. 334, 336, 337. The Acts of 1785, ch. 72, s. 22, 34; and 1818, ch. 193, s. 4; and *Brasher's Ex'rs vs. Cortlandt*, 2 Johns. Ch. 505.

STEPHEN, J. delivered the opinion of the Court. On the 13th of January, 1826, Asher Foulke, the appellee in this cause, filed his petition against the appellant in the Court of Chancery, in which he stated, that on or about the 26th of February, 1822, a certain George Andrews and Ennion Williams, filed their bill of complaint in the Court of Chancery, in which they stated, that Andrews contracted to purchase of Williams part of a tract of land in Anne Arundel County, called Duvall's Delight, for \$2,100, which sum, it was admitted, was paid by Andrews to Williams. That Andrews contracted to sell the said land to a certain Stephen Scotton for the said sum, who paid a part thereof, and gave his single bill for the balance; that other payments had been made, leaving a considerable balance due; that Scotton was dead, intestate; that his personal estate was insufficient to pay his debts, and prayed that a decree might pass for the sale of the said land, or such part thereof as would satisfy the debts of the intestate. That on the coming in of the answer of the respondents, the Chancellor passed a decree for the sale of the land, by which decree, the petitioner states, he was appointed trustee to make said sale; that Anderson, the appellee, became the purchaser for eleven dollars per acre; that he reported his said sale to the Chancellor; that the appellant filed his objections to the ratification of the sale, which were overruled by the Chancel-

lor, and the sale ratified and confirmed. That from the Chancellor's order of ratification, the appellant appealed to this Court; and that this Court, on the 16th of July, 1826, affirmed the order of Chancellor. That the appellant was served with a copy of the judgment of this Court, affirming the Chancellor's order of ratification, and requested him to pay the purchase money, which he refused to do. The petition then prayed an attachment of contempt against the appellant, and an order that he be committed to prison until he completes his purchase by paying the purchase money. In this petition *the proceedings are referred to and made part thereof, showing the ratification of the sale by the Chancellor, and the **371** affirmance of the same by this Court.

On the 17th of March, 1826, the Chancellor passed an order that the appellant pay to the appellee, or bring into that Court, the amount of the purchase money, with interest, on the 17th of April then next, or show good cause to the contrary; provided a copy of that order, together with the petition of the appellee, be served on the appellant, on or before the 25th of that month. On the service of this order on the appellant, and on non-compliance with its requirement, the Chancellor, on the 12th of May, 1826, after hearing the parties by their counsel, passed the following order: "Ordered, on this 12th of May, 1826, that, no good cause having been shown against the order of this Court of the 17th day of March last, the same is hereby confirmed and made absolute. And it is further ordered, that an attachment issue against the said Samuel Anderson, to enforce obedience to the said order, returnable to the next term of this Court." From this order, the appellant appealed to this Court; and upon its merits and propriety this Court is now called upon to decide. It appears from the proceedings in this case, that on the sale made by the appellee to the appellant being reported to the Chancellor, objections to its ratification were filed by the appellant, and answered by the appellee, on full consideration of which, the sale was ratified, and that ratification affirmed by this Court; it is, therefore, not competent for the appellant now to contest the propriety or validity of that sale, it having received the sanction of the highest judicial authority of this State. But it has been contended, that as the appellant never was reported to the Court as the purchaser of the property sold by the appellee, he cannot be compelled to complete the purchase, by paying the purchase money. It does not appear, it is true, that the trustee in this case has proceeded according to the usual practice of the Court, in making a formal report of his sale; but it appears by the proceedings, that on the 9th of October, 1822, the appellant filed his petition to the Chancellor, in which he stated that he had contracted with the appellee for the purchase of the land in question, supposed to contain 140 acres, at and for the sum of eleven dollars per acre, and by the *report **372** of the trustee, (the appellee,) was returned the purchaser,

and prayed that the sale made and reported might not be confirmed. On the coming in of the answer of the appellee, and the return of depositions which were taken in pursuance of the Chancellor's order, and upon the return of the locations made by the sheriff of the county under the same authority, the Chancellor passed an order ratifying and confirming the sale, which order, on appeal, received the sanction of this Court. It is, therefore, now too late for the appellant to object that he was not reported in the more formal and usual way, to the Court of Chancery, as the purchaser of the property. The trustee, moreover, in answering the petition of the appellant against the ratification of the sale, refers to and makes a part of his answer, the written contract of sale to the appellant, executed by both the appellant and appellee, which mentions fully the terms of sale, and which is understood to be the sale ratified by the Chancellor. Under this view of the subject this Court are of opinion, that there is nothing in the objection that the appellant was not reported to the Court as the purchaser of the property, and that a good title cannot be conveyed to him in consequence of this irregularity in the proceedings.

It has been contended that the Court of Chancery has no power, by a summary proceeding to compel a purchaser at a trustee's sale, made under the authority of its decree, to complete his purchase by enforcing the payment of the purchase money. This objection, it is conceived, cannot be available in the case now under consideration. The trustee did not take either notes or bonds for the payment of the purchase money, upon which a suit or suits at law could have been instituted, but relied solely upon the liability of the purchaser arising from the contract of sale, which was not binding upon either party until ratified by the Chancellor; but when ratified, it was his duty to pay the purchase money, or show good cause to the contrary. Neither of which has he done in the present case; for neither the allegation of the trustee's inability to comply with the terms of the sale, nor that the property, being in the possession of a third person, the trustee was unable to deliver him possession, is supported by a shadow of proof. Had the Chancellor, therefore, under the circum-

373 stances of this case, a right to adopt the * proceeding to which he resorted to compel the payment of the purchase money? We think he had. The order of the Chancellor was, that Samuel Anderson, the purchaser, should pay the money to the trustee, or bring the same into Court on a particular day, or show good cause to the contrary. Under the terms of this order, it is not perceived why Anderson could not have made as full a defence, and have availed himself of all the objections, which could have been relied upon, in case an original bill had been filed against him to enforce the same object. Upon application to the Chancellor, setting forth that testimony would be essential to his defence, on the hearing of the order, the Chancellor would have passed an order to enable him to obtain

it, upon the return of which a full hearing of the merits of the case might have been had, and if equity and justice required it, he would and ought to have been discharged from his purchase. That the Court of Chancery in England has the power of compelling a purchaser to pay his purchase money after the confirmation of the sale, by an order for that purpose, is not to be doubted. *Lansdown vs. Elderton*, 14 Ves. 512; *Newland Ch. Pr.* 336. In *Brasher's Ex'rs vs. Cortlandt*, 2 Johns. Ch. Rep. 506, 7, it appears, that by the practice of the Court of Chancery in New York, a purchaser may be compelled to complete his purchase; and Chancellor Kent in that case is reported to have said, "I have no doubt the Court may, in its discretion, do it in every case where the previous conditions of the sale, have not given the purchaser an alternative."

In this case it is quite apparent that the procrastination and delay are the objects of the purchaser, as he has taken every measure in his power to prevent the ratification of the sale; and after the sale was ratified, on appeal to this Court, has still refused to pay the purchase money, and has driven the trustee to resort to the compulsory power of the Court of Chancery to coerce payment. Under these circumstances, we think it a fit case for the exercise of such a power by that Court; although it is not intended at present to establish any general rule on the subject. There is nothing in the objection that the quantity of land sold has not been sufficiently ascertained.

Order affirmed.

* MUNNIKUYSON'S Adm'x *vs.* DORSETT'S Adm'x.—June, 374
1828.

To a writ of *scire facias* upon a judgment against an intestate, the sheriff returned *nihil*, when the defendant, the administratrix, according to the record of the cause, voluntarily appeared by attorney, and a rule was laid on her to plead. After several imparlances, in 1817 a *fiat* was entered by default. In 1825 the defendant moved the Court to strike out the judgment, and filed affidavits which showed, in substance, that before the writ of *scire facias* issued she had removed from the county where the judgment was obtained; that she never had any knowledge of this suit until long after the *fiat* was entered on the *scire facias*, and execution sued out, nor until after it was made the foundation of proceedings against her sureties on her administration bond; nor had she ever employed the attorney, who appears on the record, to represent her; that as soon as she had notice of these proceedings, she applied for an injunction to stay proceedings at law; that the plaintiff's attorney had been paid a part of the original judgment, and was informed that there was not a sufficiency of assets to pay the whole. The County Court, thereupon, ordered that the *fiat* by default be stricken out. On appeal—*Held*, that the County Court had no authority under the

circumstances of this case to strike out the *fiat* entered on the *scire facias*. (a)

The appearance of an attorney, without proof of an authority derived from a defendant, does not *per se* invalidate a judgment.

If loss be sustained thereby, the attorney must answer in a civil action by the party injured.

Where the County Court strike out a judgment under the Act of November, 1787, ch. 9, s. 6, they are bound to order regular continuances of the cause, from the time of the rendition of the judgment to its being stricken out, to be entered on the docket, so that the matters in dispute may be fairly brought to trial—their failure to do this, works a discontinuance of the action, and an appeal lies from such order. (b)

Judgments at law are not lightly to be interfered with; and it must be a strong case to induce the Court to strike out a judgment of almost eight years standing. (c)

(a) Approved as to the effect of the appearance of an attorney in a suit in *Georges Creek Co. vs. Detmold*, 1 Md. Ch. 382; *McCauley vs. State*, 21 Md. 569; *Dorsey vs. Kyle*, 80 Md. 520; *Starr vs. Heckart*, 32 Md. 273. See also *Henck vs. Todhunter*, 7 H. & J. 204, note; 2 *Poe's Pldg.* sec. 8. There may be cases suggested, however, of fraud and imposition, where it would be proper, and indeed necessary, for the Court to interpose and relieve a party from the operation of a judgment, or other judicial proceeding, attempted to be fixed upon him by the act of an unauthorized attorney. *Dorsey vs. Kyle*, *supra*. The motion in the case in the text was overruled because it appeared from the record that the appearance of the attorney was regularly entered, and also because the administratrix had applied to the Prince George's County Court, setting in equity, for an injunction to restrain further proceedings on the *fiat* judgment. *Starr vs. Heckart*, *supra*. As to when equity will restrain by injunction a judgment obtained by fraud, mistake, &c. see *Briesch vs. McCauley*, 7 Gill, 189; *Katz vs. Moore*, 13 Md. 566; *Kearney vs. Sascor*, 37 Md. 264; *Ewinger vs. Nickle*, 45 Md. 413; *Hill vs. Reifsnider*, 46 Md. 555; *Darling vs. Baltimore*, 51 Md. 1.

(b) Approved in *Green vs. Hamilton*, 16 Md. 327, and *Greff vs. Fickey*, 30 Md. 78. Distinguished in *Boteler vs. State*, 7 G. & J. 113. In *Green vs. Hamilton*, it is said that the *fiat* in the case in the text was stricken out, "but on appeal that ruling was reversed, not merely because, as stated in argument here, the Court had omitted to order regular continuances to be entered, but expressly also on the broad ground that under the circumstances of the case the County Court were not authorized to strike out the judgment on the *sci. fa.* It was suggested that the appeal should be dismissed, because the Court had given no final judgment; but the decision was made on the merits and the order reversed." In 2 *Poe's Pldg.* sec. 391, it is said that "the defendant may always appeal from an order refusing to strike out a judgment against him, whether his motion be made at the same term at which the judgment was recovered or at any subsequent term; but the plaintiff has a right of appeal only where the judgment is stricken out at the instance of the defendant upon motion filed after the lapse of the term at which the judgment was entered."

(c) Approved in *Hall vs. Sewell*, 9 Gill, 155; *Kemp vs. Cook*, 18 Md. 139; *Joyes vs. Scott*, 34 Md. 60; *Dorsey vs. Dorsey*, 37 Md. 74. In *Joyes vs. Scott*, the Court said; "In the cases of *Munnikhuyson vs. Dorsett*, and *Klinefelter vs. Carey*, 8 G. & J. 349, the Court refused to sanction the striking out of the judgments by default, upon the ground that there had been too long

APPEAL from Prince George's County Court. On the 7th of May, 1816, the plaintiff in that Court, (now appellant,) sued forth a writ of *scire facias* on a judgment therein rendered at April Term, 1807, in favor of the plaintiff, against the defendant's intestate, for \$600 damages, and \$7.28 costs. It stated the death of the intestate, and that administration on his estate had been granted to the defendant, &c. The sheriff was commanded to give notice, &c. to the defendant, and at the return day he made return of the writ *nihil*. The record states that the defendant, as administratrix, voluntarily appeared in Court, and a rule was laid on her to plead to the *scire facias* and by * Archibald Van-Horn, her attorney, she prayed the Court, and obtained leave to imparl until the next term of the Court. At the next term, (April, 1817,) she prayed and obtained further leave of the Court to imparl until the next term, for the purpose of pleading to the *scire facias*. At which term, (September 1817,) the plaintiff appeared, but the defendant made default, and a *fiat* was entered against her by default, in the usual manner. On the 13th of April, 1825, the defendant moved the Court, then sitting, to strike out the judgment of *fiat* entered against her, and she filed in Court her own affidavit, and that of T. Tyler. Her affidavit stated, "that in the fall of 1815, after taking letters of administration upon the estate of her deceased husband, and selling all his personal estate pursuant to an order of the Orphans' Court of Prince George's County, she removed to the District of Columbia, leaving the affairs of her administration to be settled by Major Trueman Tyler, and that she has continued to reside there ever since. That she never knew anything of the issuing of any writs in the above suit, nor that Archibald Van-Horn, who she never employed as attorney in any case whatever, had appeared for her in the said suit, nor that any rule was laid upon her to employ new counsel in that suit, upon the death of the said Van-Horn nor that any *fiat* had been entered against her in said suit, nor that any execution had been issued against her thereupon; but was entirely ignorant that any proceedings had been

a lapse of time. In the one case the judgment was of eight years standing, and in the other nine. * * These cases, and the authorities to which they refer, do not go so far as to hold that lapse of time, under all circumstances, is a sufficient ground for refusing to strike out a judgment of this description, but they establish the doctrine that when it occurs a strong case upon the merits must be presented in support of such a motion. The party making it must not only allege a sufficient reason, but the allegation must be sustained by the proof in the case." The judgment records of the State are the highest evidences of debt known to the law; they are presumed to have been made up after the most careful deliberation, upon trial or hearing of both parties. *Kemp vs. Cook, supra*. Except for special causes, and upon equitable grounds well defined and understood in the law, Courts of justice have no power to interfere with, or to disturb, their own final judgments and decrees after the lapse of the term in which they have been rendered. *Dorsey vs. Dorsey, supra*.

instituted in any Court whatever against her in relation to the subject-matter of that suit, until after suits had been instituted against her sureties in her administration bond. That she never did in any manner assent to or acquiesce in the said *fiat*, but on the contrary did immediately, upon receiving notice that the said *fiat* had been entered against her, unite with Mackall S. Cox, one of the said sureties, (against whom a judgment had been obtained for the amount of the said *fiat*, upon her said administration bond, and against whom an execution had been issued upon said judgment,) in a bill of complaint, filed in the County Court of Prince George's County, as a Court of equity, applying for an injunction to stay proceedings at law on the said judgment. And further, that she was induced to believe that nothing had been done in the said judgment or *fiat* by a letter

376 * which she received from J. J. Donaldson, who was the attorney who appeared for the plaintiff, and obtained the said *fiat*. Which letter she herewith exhibits." The letter referred to was dated Baltimore, the 20th of September, 1817, stating that he had obtained three judgments against her husband in his life-time, which he was assured by Mr. Tyler would be paid that summer. Being under that impression when he was at September Court, he called on Mr. Tyler for settlement, who said he had no funds in hand, but expected them from her. That as it was absolutely necessary they should be immediately settled, he hoped she would not delay the promised arrangement, otherwise he must sue on her administration bond, and make her securities liable. The affidavit of T. Tyler, the agent of the defendant, stated that he gave notice to all the creditors of the deceased to present their claims, and that among those presented, and a proportion of which were paid, was the judgment, the *scire facias* in this case seems to revive against the defendant. That in the years 1816 and 1817, he had frequent conversations with J. J. Donaldson, the plaintiff's attorney, in relation to the said judgment and payment thereof. That he always informed the said Donaldson that there would not be a sufficiency of assets in the hands of the administratrix to pay the whole of that judgment. Nothing was said in those conversations about any suit being instituted against the said administratrix. That he never knew or heard that the suit, by which the above was obtained against the administratrix, had been, or was intended to be instituted, until he was surprised on hearing, after the judgments had been obtained, that the defendant's administration bond had been sued, and judgments obtained thereon against her sureties. That he never knew that A. Van-Horn, Esquire, had appeared for the administratrix in the said suit, nor that any rule had been laid upon her to employ new counsel.

The County Court at the said term, (April, 1825,) ordered that the *fiat* so as aforesaid rendered by default, be stricken out. From this order the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, ARCHER, and DORSEY, JJ.

* *J. Johnson*, for the appellant, contended, 1. That the *fiat* against the administratrix was evidence of assets, whether that *fiat* was by confession or default; and that it was immaterial whether the attorney, who suffered the default, was employed or not. **377**

2. That if the *fiat* was not considered conclusive evidence of assets, it was too late to move to set it aside; or at all events, that it could only be set aside on payment of costs.

On the first point, he cited *Ruggles vs. Sherman*, 14 *Johns.* 446; *Rock vs. Leighton*, 1 *Salk.* 310; 3 *Bac. Ab. tit. Executors, &c.* (M) 88, (note b;); *Henck vs. Todhunter*, 7 *H. & J.* 275; *Denton vs. Noyes*, 6 *Johns.* 296. On the second point *Thomas' Coke Litt.* 511, (note E;); 1 *Com. Dig. (New Ed.) tit. Amendment*, 603, (note a;); *Devenport vs. Feris*, 6 *Johns.* 131; *Dand vs. Barnes*, 6 *Taunt.* 5, (1 *Serg. & Low.* 291;); *Fletcher vs. Wells*, 6 *Taunt.* 191, (1 *Serg. & Low.* 352;); *Phillips vs. Hawley*, 6 *Johns.* 129.

Ashton and Magruder, for the appellees, cited 1 *Reeves' Hist. E. L.* 417; 2 *Reeves' Hist. E. L.* 71; *Co. Litt.* 259 b; *Rich. Pr.* 45; 1 *Arch. Pr.* 23, 25; 2 *Arch. Pr.* 8, 88; *Morrice vs. Green*, 3 *Salk.* 213; *Darnall vs. Harrison*, 1 *H. & J.* 137; *Ryland vs. Noakes*, 1 *Taunt.* 342; *Robison vs. Eaton*, 1 *T. R.* 62; Act of 1720, ch. 24; *Forsyth vs. Marriott*, 4 *Bos. & Pull.* 251; and the Act of 1787, ch. 9, s. 6.

DORSEY, J. delivered the opinion of the Court. The circumstances detailed in the depositions filed in this case, were not a sufficient warrant to the Court below, to strike out the judgment against the appellee. The *scire facias* against Fielder Dorsett's administratrix was regularly issued, to which a voluntary appearance for the defendant, was entered by Archibald Van-Horn, an attorney of Prince George's County Court, and a judgment by default was rendered against her by reason, as stated in the argument, of the death of Van-Horn before the judgment term; and it is alleged, no rule was laid on the defendant to employ new counsel. The want of such a rule does not vitiate the judgment; the party has no legal right to demand it; its imposition is not the offspring of any mandate of the law, but of the courtesy of the bar, which is encouraged by the Court, as tending to subserve the purposes of justice. **378**

The appearance of an attorney, without proof of an authority derived from a defendant, does not *per se* invalidate a judgment. If loss or injury be sustained thereby, the attorney must answer it in a civil action by the party injured. The sufficiency of his estate to do so, was admitted in the argument of the case before us; and there is no insinuation of fraud or covin.

But conceding that the circumstances under which this judgment was rendered, afford an ample justification for its being stricken out,

a conclusive objection, to its being done, is the statement in the affidavit of the appellee, that she had united in an application for an injunction, (and *ex necessitate rei* for relief,) to the Prince George's County Court, sitting as a Court of equity, with Mackall S. Cox, one of the sureties in her administration bond, against whom a judgment and execution had been obtained, founded on the *fiat* and proceedings against her. Whether this proceeding in equity be still pending or finally determined against the complainants, does not appear. But in either event it is an insuperable barrier to the granting of that summary relief which she has successfully sought at the hands of the County Court. The grievance complained of is one, against which the County Court, on its equity bench, is competent, not to say peculiarly fitted, to relieve. The party has elected the tribunal from which she seeks redress; and there she should be left to obtain it, and not take two chances for relief—involving the appellant in a double series of litigation, and possibly obtaining, as it were, inconsistent and contradictory decisions upon the same subject.

Judgments at law are not lightly to be interfered with; and it must be a case infinitely stronger than the present to induce this Court to sanction the striking out of a judgment of almost eight years standing, in virtue of which too, in due course of law, another judgment hath been obtained by confession, and execution levied thereunder.

This Court do not concur with the suggestion, that the appeal must be dismissed, because the Court below, (as is contended,) have given no final judgment in the cause. By ordering the judgment to be
379 stricken out, and giving the plaintiff no * day in Court, there is an end of the suit; and the parties in that proceeding have no further opportunity of litigating their rights. Even if the County Court were right in striking out the judgment, (which we cannot admit,) they were bound to have ordered regular continuances of the cause to have been entered on the docket, so that the matters in dispute might have been brought fairly to trial, as directed by the Act of 1787, ch. 9, s. 6. Their failure to do this works a discontinuance of the action, and thereby inflicts an injury on the plaintiff, to redress which this appeal properly lies.

But we must not be understood as predicating our reversal upon this reason; but upon the broad ground, that under the circumstances of this case, the County Court were not authorized to strike out the judgment on the *scire facias*; and that the *fiat* must remain in full force, unless relief against it be granted in equity.

Order reversed.

THE STATE, use of SADLER'S Ex'x vs. COX.—June, 1828.

Where a judgment is stricken out, it is the duty of the Court, under the Act of 1787, ch. 9, s. 6, to direct the suit to be brought up by regular continuances. (a)

In an action on an administration bond, a replication which showed the existence of a debt due from the intestate, and that the administrator was in insolvent circumstances, would render the surety liable, unless he could prove that the estate of the deceased had been duly administered.

APPEAL from Prince George's County Court. This was an action of debt, brought on the 1st of February, 1820, on the administration bond executed by Amelia T. Dorsett, administratrix of Fielder Dorsett, on the 5th of October, 1815, with John H. Brown and the defendant, (now appellee,) as her sureties. The defendant having been served with the writ, appeared by an attorney of the Court, and pleaded general performance of the condition of the bond by the administratrix. The plaintiff's replication assigned for breach the recovery of a judgment in Prince George's County Court by Mary Munnikuyson, administratrix of John, against Fielder Dorsett, for \$600 damages, and \$7.28 costs. That a writ of *scire facias* issued on the said judgment against Amelia T. Dorsett, as administratrix of Fielder, and a *fiat* entered thereon at September Term, 1817. That a writ of *ieri facias* issued thereon against the said administratrix, which was returned *nulla bona*. Averments that the administratrix at the time of the judgment against her, had assets, &c. and non-payment of the debt, &c. The defendant was ruled to rejoin to the replication; and at September Term, 1821, he again appeared by his attorney, and confessed judgment, which was entered at that term for the plaintiff for the debt, &c. Afterwards on the 21st of April, 1825, the defendant moved the Court, then sitting, to strike out the above judgment. At the time of making the motion, he filed in Court his own affidavit, in which he stated, that the above judgment was obtained against him as a security in the administration bond of Amelia T. Dorsett, administratrix of Fielder. That the said judgment was obtained against him, in consequence of a *fiat* entered against the said administratrix at September Term, 1817, which was upon a judgment obtained against the said Fielder in his life-time. That when the writ, which was issued and served upon him in this case, he did not know what was the situation of the administration of the estate of the said Fielder. That some attorney of the Court, at the return of the writ, entered an appearance

(a) Cited in *Boteler vs. State*, 7 G. & J. 113. See *Munnikuyson vs. Dorsett*, ante, m. p. 374.

for him, without any warrant or authority from him, and that the said attorney never informed him that he had appeared for him, nor consulted with him about what defence was to be made to the action; and whatever plea was pleaded in the suit was without his knowledge or direction. That he never knew any thing about what pleas had been pleaded or what proceedings had been had in the said suit, until after a judgment had been obtained against him, and until a *fieri facias* was levied upon his property. That immediately upon the said *fieri facias* being so levied, he went to the District of Columbia to inform the said Amelia T. Dorsett thereof, and get her to advance the money to pay the amount of the said execution, he supposing that she had sufficient assets in her hands to pay the said judgment. But to his great surprise she informed him that she had no knowledge of any suit having been instituted against her upon which any judgment could be obtained; and that she had left

381 all the assets of her intestate in * the hands of Major Tyler, as her agent, to be applied to the payment of the debts of the intestate. That he went to the said Tyler, who informed him that he had fully settled the administration of the said estate; that all the assets had been exhausted in the payment of the judgment creditors, and that he had paid towards the plaintiff's judgment so much as amounted to the distributable share which that judgment was entitled to. That as he had ascertained the situation of the estate, and found that the *fiat* on the *scire facias* against the administratrix, had been rendered against her without authority, he prevailed on her to unite with him in a bill to be filed in the County Court as a Court of equity, for the purpose of obtaining relief in the premises. That on the 28th of October, 1822, such bill was filed, and an injunction obtained to stay proceedings at law upon the said judgment. That the injunction was continued until the month of November, 1823, when it was dissolved inadvertently by the Court, without any notice having been given to him, or the said Amelia T. or their solicitor, who was then in Court. That after the dissolution of the injunction he was advised, that if the said Amelia T. would make a motion to the Court to set aside the *fiat* entered against her, the Court would strike out the said *fiat*; and if that was done, a motion would then lie and prevail to strike out the judgment in this case. That the Court having ordered the said *fiat* entered, against the said Amelia T. to be stricken out, a motion is now made to strike out the judgment against this defendant.

The Court thereupon ordered that the judgment in this case be stricken out *nisi*; and the plaintiff have leave to show cause to the contrary at the next term. At the next term no cause being shown to the contrary, the order or judgment of the Court, striking out the said judgment, was declared to be final; and that the defendant go without day, &c. From which order or judgment the plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, ARCHER, and DORSEY, JJ. by

J. Johnson, for the appellant, and by

Magruder and *Ashton*, for the appellee. See the case of *Munnikuyson's Adm'x vs. Dorsett's Adm'x*, (*ante*, 374.)

* ARCHER, J. delivered the opinion of the Court. There is a conclusive objection to the proceedings of the County Court. 382 They have struck out the judgment, without directing the suit to be brought up by regular continuances. This is manifest from the record, for the judgment is ordered to be struck out, and the defendant is discharged without day. If it had been proper to have stricken out the judgment, it was indispensably necessary to have entered the regular continuances, otherwise the salutary provisions of the Act of 1787, ch. 9, s. 6, would be lost to the plaintiff. For to recover his debt, if recoverable at all, he would be compelled by this proceeding, not only to pay the costs of the action, but to begin *de novo* : whereas, had the continuances been regularly entered, it is not for this Court to say, but that by an amendment of his pleadings, notwithstanding the original judgment had been struck out, he might have recovered. He might have replied to the plea of general performance the existence of a debt due from Fielder Dorsett, and that the administratrix was in insolvent circumstances, which would have rendered the security liable, unless he could prove that the estate had been duly administered.

DORSEY, J. dissented.

Judgment reversed.

WOLF vs. WOLF'S Ex'r.—June, 1828.

To a bill of discovery filed by an executor against the widow of his testator, charging her with retaining from him a certain sum of money, and certain *choses in action*, belonging to the estate of his testator, and that no person was present when she possessed herself of them, the defendant demurred, and assigned for cause, that the discovery did, and might by the laws of this State, subject her to certain pains and penalties; but the Court overruled the demurrer, and held that the allegations in the bill were not of such a character as would, if answered, subject the defendant to the apprehended consequences. (a)

A defendant in equity is not bound to make any discovery in answering a bill that would subject him to the punishment of the law by a criminal prosecution, or would cause him to incur any pains, penalties or forfeitures. (b)

(a) Cited in *Chappell vs. Funk*, 57 Md. 473, as to right of appeal from an order overruling a demurrer to a bill.

(b) Approved in *Dennison vs. Yost*, Court of Appeals, October Term, 1883. Cf. *Legoux vs. Wante*, 3 H. & J. 447; *Taney vs. Kemp*, 4 H. & J. 282; *Broadbent vs. State*, 7 Md. 416; Rev. Code, Art. 65, sec. 47.

But it must appear, either by the bill of the complainant, or plea of the defendant, that his answer may subject him to punishment, or he will be compelled to make the discovery asked for in the bill.

383 * If no such penal consequence will follow, it is the undoubted right of a complainant to ask, and the duty of the defendant to make, the discovery sought, in aid of the administration of civil justice.

A discovery may be had not only to support an action, but as auxiliary to the maintenance of a suit then contemplated to be brought.

APPEAL from Frederick County Court, sitting as a Court of Equity. The bill of the complainant (the now appellee,) stated that his testator on the 9th of August, 1820, made his last will, and appointed the complainant his executor; that he did in April, 1824, institute a suit in Frederick County Court against Mary Wolf, (the appellant,) widow of the deceased, for money of which the deceased died possessed, and which the said Mary took and retained from the complainant, and refused to pay over to him as the executor of the deceased. That he had every reason to believe that she had retained and held \$800 or \$1,000 in money which was in the possession of the deceased, at the time of his death. To recover which the complainant had brought suit in Frederick County Court, as a Court of law. The bill then charges that the defendant took possession of all the money, bonds, &c, and papers, belonging to the deceased, at the time of his death, but as to the exact amount of money the complainant was ignorant, yet he believed that she retained and held from him \$800 or \$1,000, which ought in justice to be delivered over to him, with the other property of the deceased. That the complainant had repeatedly called on the defendant to deliver to him all the money and other personal property of which the deceased died the owner and possessor, which she refused to do. The bill then states that no person was present when the defendant took possession of the money aforesaid, therefore, the complainant has no legal proof to support his said action at law against the defendant, without a discovery of the facts by the defendant on oath, &c. That the object in calling on the defendant to discover the amount of the money retained by her, was to make use of the said discovery on the trial of the action at law. That the defendant had retained, and then held in her possession a number of notes, bonds, &c. which belonged to the complainant, as executor of the deceased, which she refused to deliver to him, &c. That the facts herein stated are exclusively within the knowledge of the defendant, and cannot be proved by any other person. That the complainant * had, as executor, received from the defendant

384 money, notes, &c. a part of the estate of the deceased.—Prayer for a discovery, &c. with certain interrogatories to be answered, &c. and among others to discover her knowledge relative to a note against William Grimes, payable to the deceased, &c. The defendant demurred to the bill; and for causes of demurrer showed, that the scope and end of the complainant's bill was to have and obtain discovery

touching certain money, bonds, &c. belonging to the deceased, at the time of his death, supposed by the bill to be retained and withheld by the defendant from the complainant. Which discovery the complainant seeks by his bill to claim, as executor of the deceased, to be used on the trial of a suit at law, &c. And yet the complainant had not alleged in and by his said bill that the will of the deceased had been authenticated and proved, or that letters testamentary, if any, had been granted to him, the complainant, as executor, &c. or that he had, before the filing of his said bill, executed a bond, &c. for the faithful performance of the trust, if at all in him reposed as executor, or had otherwise taken upon himself the burthen of the execution of the said will, or in any way entitled himself to seek or claim discovery from the defendant touching any money, bonds, &c. of the deceased; wherefore she demurred to the said bill, &c. And for further cause of demurrer the answer also stated, that by the known and settled rules of the Court, no person ought to be compelled to set forth or discover any matter or thing which doth or may subject him or her to any pains, penalties or forfeiture whatever; and therefore, as the said discovery doth and may, by the known laws of this State, subject and make the defendant liable to certain pains and penalties, she doth demur in law to so much and such parts of the bill as pray discovery of the aforesaid matters; and demands the judgment of the Court whether she ought to be compelled to make any further or other answer, than as aforesaid, to such parts of the bill as she hath so demurred unto. And as to so much and such part of the bill as seek to have discovery from her of her knowledge relative to a note against William Grimes, payable to the deceased, she demurs; and for cause of demurrer in this behalf sheweth, that the discovery sought would either criminate her or not; * if the former, she ought not to be compelled to discover or set forth any matter or thing whereby she may impeach or ac-
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cuse herself of an offence or crime which doth or may subject her to any pains, penalties or forfeiture whatever; if the latter, it does not appear in and by the bill, nor does the bill allege, with sufficient certainty, that the defendant had any interest in the said note, or that she should not be examined as a witness concerning her knowledge relative to the said note, or that discovery is sought of her, of her knowledge relative to the said note, otherwise than as a mere witness; and, therefore, she doth demur in law to so much and such parts of the said bill as prays the last aforesaid discovery, &c. On motion of the complainant he had leave to amend his bill by inserting that he had obtained letters testamentary from the Orphans' Court, under the will of the deceased, and had filed his bond as executor, in the said Court, &c. The case being submitted upon argument, the County Court, [SHRIVER A. J.] after stating the case, proceeded—In coming to a decision in this case, it is first to be ascertained whether the complainant has shown such an interest in him-

self as entitles him to the discovery he seeks to obtain? And secondly, whether the demurrers set forth sufficient causes to protect the defendant from answering the complainant's bill? As respects the first point, it is the opinion of the Court, that the complainant, in showing that he is the executor of Jacob Wolf, and that the money, bonds, &c. as mentioned, belonged to him, has shown such an interest as entitles him to the discovery he seeks to obtain against the defendant; unless that discovery should subject her to the pains, penalties or forfeitures, or some of them, as stated in the demurrers. To establish the second point, it has been strongly insisted upon in argument, that discovery would subject the defendant to the pains, penalties and forfeitures stated, and that upon the ground of part of the money, &c. as represented in the bill, having been retained by her from the complainant, which it is urged is such a severance as amounts to larceny. (*Chitt. C. L.* 918.) But the cases of the carrier, miller, &c. on which this distinction rests, are not analogous to the one in question. In those cases the goods were de-

386 livered upon special trust, for a specific purpose, by * which a temporary property was acquired. Under these circumstances a possession of part, distinct from the whole, not being founded on delivery from the owner, but gained by wrong, constitutes a felony. But these cases differ widely from that of a widow. To her there was no delivery on special trust, or for any specific purpose, nor was the property acquired of a temporary nature. By marriage she and her husband were but one person in legal contemplation; and she became widowed of all his worldly goods, by which she acquired a certain interest in them. So that, whilst a severance in the class of cases mentioned, is to be regarded as the result of a dishonest interest, the circumstances attending the case of a widow, are so entirely different, that they may well be supposed to result from an uncertainty in her mind as to her rights, and difficulty of conceiving that she was unauthorized any longer to exercise control over property that she had in connection with her husband, viewed as her own. To apply to such a case a charge of felony, would be a degree of harshness, that the Court believe has never yet been witnessed in this country, nor in that from which we have derived much of our criminal jurisprudence, and never will, whilst a just allowance is made for the misapprehension and distraction to which the forlorn and melancholy state of a widow is subject—Decreed, that the demurrers in this case be overruled, &c. and that the defendant file such plea or answer as the merits of the case, and the practice of the Court require. From this decree the defendant appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN STEPHEN, and ARCHER, JJ.

W. Schley, for the appellant, contended, that the decree ought to be reversed—1. Because the parts of the bill covered by the first

special demurrer charged the defendant with a felony. 2. Because the discovery, to which the second special demurrer applies, would criminate her or not. If the former, she was not bound to answer; if the latter, it did not appear that she had any interest in the subject-matter of the discovery; or was in anywise incompetent to be examined as a witness in respect to her knowledge. 3. Because the discovery as to * the taking the bonds, &c. (every thing except the money,) did not appear to be material. A demurrer **387** may be assigned *ore tenus* in this Court. 4. Because the suit would not lie in aid of which the discovery was sought.

On the first point, he cited *Toller*, 133, 156; 1 *Hale's P. C.* 514; 2 *Bac. Ab.* 417; *Cooper's Plead.* 12; *Claridge vs. Houre*, 14 *Ves.* 65; 2 *Stark. Evid.* 838, (and note z;) *Cartwright vs. Green*, 8 *Ves.* 405. On the second point, *Cooper's Plead.* 202; *Fenton vs. Hughes*, 7 *Ves.* 290; *Cartwright vs. Green*, 8 *Ves.* 405. On the third point, *Cooper's Plead.* 12, 115; *Cartwright vs. Green*, 8 *Ves.* 405; *Pyle vs. Price*, 6 *Ves.* 780; *Brinkerhoff vs. Brown*, 6 *Johns. Ch.* 146, 149, 159; *Cooper's Plead.* 198, 199. On the fourth point, *Cooper's Plead.* 194.

Palmer and Ross, for the appellee, cited *Sharp vs. Sharp*, 3 *Johns. Ch.* 407; *Le Roy vs. Veeder*, 1 *Johns. Cas.* 417; *Chaincey vs. Tahourden*, 2 *Atk.* 392; *Mitf. Plead.* 157, 224; *Arch. Cr. Plead.* 124; 1 *Hale's P. C.* 505, 515; *Kent's Mitf. Plead.* 155; *Verplank vs. Caines*, 1 *Johns. Ch.* 57; *Earl of Suffolk vs. Green*, 1 *Atk.* 449, 450; *Laight vs. Morgan*, 1 *Johns. Cas.* 429; *Higinbotham vs. Burnet*, 5 *Johns. Ch.* 184; *M'Intyre vs. Mancius*, 16 *Johns.* 597, 599; *Claridge vs. Hoare*, 14 *Ves.* 59; *Chitty's Cr. L.* 918.

STEPHEN, J. delivered the opinion of the Court. This is the case of a demurrer to a bill of discovery filed by the appellee against the appellant, on the equity side of Frederick County Court, on the ground that the matters and things charged in the bill, of and concerning which a discovery is sought to be obtained, would or might, if confessed or answered by the respondent, subject her to punishment. The principle is incontrovertibly clear and well established, that a defendant in equity is not bound to make any discovery in answering such a bill as would subject her to the punishment of the law by a criminal prosecution, or would cause her to incur any pains, penalties or forfeitures. In this respect the principles of equitable jurisprudence interpose the same shield of protection, by which a witness is guarded in a Court of common law; but it * is **388** equally clear, that if no such penal consequence will follow, it is the undoubted right of the complainant to ask, and the duty of the defendant to make, the discovery in aid of the administration of civil justice.

In examining the allegations in the bill, it is not perceived, that they are of such a character as would, if answered, subject the respondent to the apprehended consequences. She was the widow of

the complainant's testator, and shared largely in the bounties of his will, and it is presumed, in consequence of that relation, most, if not all of his money and *choses in action*, passed into her custody and possession on his death. The allegations in the bill are nothing more than a charge of withholding from the complainant, the executor, who is legally and rightfully entitled to them for the purposes of his administration, a certain sum of money, and certain *choses in action*, belonging to the estate of his testator.

The only feature of the bill, which seems to cast the most distant look towards a criminal accusation, is that part of it which charges, that no person was present when she possessed herself of the money, bonds and notes; but it is most manifest, that this averment was not made to give a color of criminality to her conduct, but to indicate the necessity of appealing to her oath, to enable the complainant to prosecute the suit against her, which was then pending at law, or any other suit, which he might thereafter find it necessary to institute. The charge is, "that no person was present when the said Mary Wolf took possession of the money aforesaid; therefore, your orator hath no legal proof to support his said action against Mary Wolf, without a discovery of the facts by the said Mary Wolf in this honorable Court, on oath." It is not necessary, as was contended by the counsel for the appellant, that the discovery must be of matter necessary to support the action then pending against her in Frederick County Court; because the position is undeniable, that a discovery may be had, not only to support an action then instituted, but as auxiliary to the maintenance of a suit then contemplated to be brought. This principle is clearly laid down by *Cooper*, in his *Treatise on Pleading in Equity*, 191, 192, where he says, "where a bill was brought for a discovery in aid of an action intended to be brought, a demurrer, * upon the ground that a bill will not lie
389 merely for a discovery to enable the plaintiff to go to law, where the plaintiff had not actually brought his action, was overruled." In support of this doctrine he cites *Moodalay vs. Morton*, 1 *Bro. Ch. Rep.* 469; 2 *Dick.* 652.

Where a crime is charged in the bill, it is the privilege of the respondent not to be compelled to confess, either the offence charged, or any fact which may aid in the prosecution of it. This principle will be found in *Claridge vs. Hoare*, 14 *Ves.* 65, laid down in the following words: "A defendant has a right to insist that he is not to be compelled to answer, not only the broad and leading fact, but any fact, the answer to which may furnish a step in the prosecution, if any person should chose to indict him." But it must appear, either by the bill of the complainant, or by the plea of the defendant, that his answer may subject him to punishment, or he will be compelled to make the discovery asked for in the bill. As if a bill states a marriage of the defendant with a particular woman, this of itself is no offence; but if he pleads that she is his sister, that fact would

constitute the alleged marriage a criminal act, and he may refuse to state anything more, or to speak as to any fact or circumstance which may form a link in the chain. For this principle, see also *Claridge vs. Hoare*, 14 Ves. 64, where the Lord Chancellor, speaking in relation to this subject, says, "The first consideration is, whether an indictable offence is stated. For the consideration of that question, the fact appearing upon the plea, the embezzlement, contrary to the late Act of Parliament, must be taken to be true; also, that all the matters stated in the bill, relate to the transaction, so stated in the plea, as criminal. Then the bill and plea together bring forward the case of an individual charged with felony, and an agreement between several other persons, of which the object was to prevent a prosecution." In the case before this Court, there is nothing in the allegations of the complainant, or in the defence of the defendant, which indicate a criminal charge, to a prosecution for which, the respondent might render herself amenable by responding to the facts charged in the bill or the interrogatories therein contained.

Decree affirmed.

• WEEMS vs. BREWER. BREWER vs. WEEMS.—June, 1828. 390

A trustee appointed by the Court of Chancery sold an entire tract of land at a certain price per acre, and the sale was ratified. At the time of the sale it was known to the trustee and purchaser that a bill was pending for the recovery of an interest in such land, in opposition to those whose title the trustee was about to sell, and on the final decision under that bill it was decreed, that the complainants were entitled to one-fourth thereof. After this decision, the purchaser filed a petition in that Court, setting it forth, and claiming to vacate the sale to him, on the ground, that he was induced to make the purchase because of its proximity to his own estate, and an important road leading from his estate through the purchased premises, and connecting them together; but the existence of the road referred to, not being made out in evidence, the sale being made in perfect good faith, and it appearing that the quantity of land to be obtained from the trustee was not a material consideration in the purchase; that the trustee could make a good title under the decree to three-fourths of the land; that the petitioner had secured to himself three-fourths of the remaining fourth part, and that the trustee was placed in a situation by a deed from the party having the right, to give a title to the other fourth of that part, which if the petitioner chose to accept, would secure to him the entire object of the purchase without loss—*Held*, that he could not be discharged from his contract, when the enforcement of it, subject to a proportionate deduction for that which he had purchased from others, would do him no injury. (a)

Where the object of a purchase is not defeated, and a purchaser is not injured by the contract being enforced, he cannot be permitted to abandon it.

(a) Cited in *Marbury vs. Stonestreet*, 1 Md. 154, as to proceeding by petition to be discharged from a contract of purchase.

A purchaser claiming to be discharged from his contract, should make out a fair, and plain case for relief; and it is not every defect in the subject sold, or variation from the description, that will avail him. If he gets substantially what he bargains for, he must take a compensation for the deficiency. (b)

Chancery weighs the object and inducement of the purchaser; and looking to the merits, and substantial justice of each particular case, if the sale be fair, relieves or not, from the purchase, according as the character of the transaction, and circumstances may appear to require.

CROSS-APPEALS from the Court of Chancery. On the 9th of September, 1824, the appellant in the first, and appellee in the second of these appeals, exhibited his petition to the Chancellor, in which he stated, that in a cause commenced by bill filed in the Court of Chancery, on the 1st of October, 1819, in the names of William W. Conner, John Franklin, and Harriet his wife, Sabritt Trott, and Nancy his wife, against Abraham Fulhart, and Matilda his wife, Marmaduke W. Conner, * and Henry C. Drury, praying that a certain

391 tract of land called Holloway, or Oliver's Preservation, lying in Anne Arundel County, which had descended to the said William W., Nancy, Harriet, Marmaduke W., and Matilda, as heirs-at-law of their then deceased father, William Conner, might be sold under a decree of the Court of Chancery, and converted into cash, in order to a more convenient division of the same among them. That such proceedings were had that a decree was passed at July Term, 1821, in compliance with the prayer of the bill, and a sale of the land directed to be made by Nicholas Brewer, Junior, Esquire, the trustee, at the same time appointed by the Court, on the conditions in the said decree and order of sale and appointment. That the said trustee, after having filed a bond as required by the decree and order, on the 24th of July, 1821, proceeded in the manner directed in the said decree and order, to advertise and sell the said land, and on the 15th of November, 1821, did sell the same at public sale to the petitioner, on a credit of two years, he being the highest bidder, at \$28.20 per acre, there being 159½ acres, and the purchase money amounting to the aggregate sum of \$4,497.80. That the petitioner executed and delivered to the said trustee his bond, with the proper sureties, for the payment of the purchase money at the expiration of two years from the time of the sale, as by the terms of the said sale he was required to do. The petition further stated, that at the time of the commencement of the said suit, in which the said decree, sale and purchase, by the petitioner, were made as aforesaid, a certain other cause, commenced on the 22d of August, 1811, by the said Henry C. Drury, and Elizabeth his wife, a certain Frederick Mills, and William Stallings, and Achsah his wife, and Charlotte Johnson, against the said William W. Conner, Marmaduke W. Conner, Harriet, Nancy

(b) See *Anderson vs. Foulke*, ante, m, p. 346.

and Matilda, (then of the name of Conner,) was depending in the Court of Chancery for the land in question. That such proceedings were had in the said last mentioned cause, that after the final decree of the said Court therein, dismissing the complainants' bill, an appeal was had in the same on the prayer of the said complainants, and the said cause, and all the proceedings therein were removed for final adjudication to the Court of Appeals. That * such proceedings were had in the Court of Appeals, on the said appeal, **392** that at June Term, 1824, the said Court finally decreed therein, and by their decree ordered and directed, among other things, that the defendants in the said suit should, by a deed good in law, and by them to be executed, convey to the complainants therein specified, one undivided fourth part of the land in question (a), and which is the same land that had been purchased by the petitioner of the trustee as herein before mentioned. The petition further stated, that no part of the purchase money had been paid by the petitioner to the trustee, nor had any conveyance ever been made of the said land by the trustee to the petitioner. That by the before mentioned decree of the Court of Appeals, the title to the land is so essentially changed and altered—one-fourth of the whole being placed beyond the control of the said trustee, and it being out of his power to execute the deed, and fulfil the contract stipulated, that it would be ruinous, and of the greatest damage to the petitioner's interest, should he be called on to stand to the contract on his part, and to pay the purchase money expressed in his bond, when the other party thereto, (the trustee,) has it no longer in his power to give such title, and make such conveyance, as he in law was before bound to do. Even the payment of the purchase money at a *pro rata* calculation, would be ruinous, and tend to the great injury of the petitioner's interests; because the said premises could only be valuable to him, and he was only induced to purchase them because of their proximity to his own estate, and an important road and right of way leading from his estate through said premises, and connecting them together. Prayer, that the sale made by the trustee to the petitioner be vacated and wholly set aside, and the bond of the petitioner given up and cancelled, &c. The answer of the trustee, (the appellee in the first and appellant in the second of these appeals,) admitted that by a decree passed in the cause mentioned in the petition, he was appointed the trustee to sell the land therein mentioned; that he gave bond, and advertised the said land for sale and on the 15th of November, 1821, sold the same to the petitioner on the terms and for the sum stated in the petition, which * the respondent, as trustee as aforesaid, reported to the Chancellor on the 5th of December, 1821; on the following day a **393** conditional order of ratification was passed, and on the 12th of July,

(a) See 6 H. & J. 288.

1822, the said sale was finally ratified and confirmed by the Chancellor. The answer admitted the taking the petitioner's bond, with security, for the purchase money; and the time limited for the payment having elapsed, he instituted suits on the said bond against the petitioner, and his sureties, which are now depending. It also admitted, that at the time of the commencement of the suit in which the decree passed, under which the sale, and the purchase of the land was made as aforesaid, the suit mentioned in the petition was depending, in which the complainants therein claimed a conveyance of the whole of the land purchased by the petitioner, on the ground of an alleged contract of sale made by the ancestor of the defendants to the ancestor of the complainants; and that the petitioner was fully acquainted with the existence of the said suit at the time of the purchase made by him as aforesaid. The answer avers, that a short time before or after the said purchase, the petitioner, not being a solicitor of the said Court, for a valuable consideration, contracted with the complainants in the last mentioned cause, to maintain them therein, and in pursuance thereof did actually manage the same, and conduct it to a final hearing in the Court of Appeals, by searching for testimony, examining witnesses, and employing solicitors, with compensations contingent upon the event of the said cause, so that the Court of Appeals at June Term, 1824, finally decreed, that the defendants in the said suit should convey to the complainants one undivided fourth part only of the said land. The answer further stated, that the petitioner had purchased from the said Henry C. Drury, and Elizabeth his wife, Frederick Mills, and William Stallings and Achsah his wife, all their interest in the said undivided one-fourth part of the said land, for a less sum of money than he would have to pay therefor, according to his purchase from the respondent as trustee, so that the only adverse claim now existing against the said land, is that of Charlotte Johnson, being the one-fourth part of the said undivided one-fourth part, or one-sixteenth of the whole; and the respondent verily believed, that he could obtain

394 from * the said Charlotte and John Johnson, with whom she hath intermarried, and who reside in the State of Kentucky, a relinquishment of their interest in the said land, under an agreement to take in lieu thereof what would be their proportion of the purchase money due from the petitioner, provided he be allowed time for that purpose, and the petitioner interfere not to prevent it. That the respondent was willing that the petitioner be allowed at the rate of \$28.20 per acre, it being the amount per acre of his purchase, for the one-fourth part of the land to which the respondent could not convey a good title; or that he be allowed at the same rate for such part of the said one-fourth part, as he had acquired a right to from Henry C. Drury, and others, before mentioned, and the respondent to procure for the petitioner a good title to the residue thereof, within a reasonable time; and in the meantime not to levy

the amount due on the bond of the petitioner for the purchase money of the land. The answer further stated, that the respondent, when he sold the land to the petitioner he was in possession thereof, both as trustee and as agent for the said William W. and Marmaduke Conner, and John Franklin, and Harriet his wife, and Sabritt Trott, and Nancy his wife, and after the said sale, and the compliance of the petitioner with the terms thereof, the respondent, in performance of his duty as trustee, and also as agent of the said persons, gave the petitioner possession of the said land, and he had ever since continued in possession and enjoyed the rents and profits thereof; and that he had never paid to the respondent any part of the interest or principal of the said purchase money. That the Court, whose purpose it is to do complete justice between the parties, should, if the sale is set aside, and the bond of the petitioner delivered up, require as conditions precedent, the re-delivery of the possession of the land to the respondent, and the payment into Court, or to the respondent, the interest due on the bond, or the rents, issues and profits of the land. The answer further stated, that inasmuch as the sale of the land by the respondent to the petitioner has been finally ratified and confirmed as before stated, the Court could not set aside the same in a summary way on petition, but the petitioner must file an original bill. The answer further stated, that the *respondent knew 395 of no such important road, or right of way, as the petitioner speaks of in his petition; and that he believed that the petitioner was induced to purchase the land, only because of its great fertility, and its adjoining his own farm, and that the said land, at a small expense, might be connected with the farm of another gentleman, who actually did bid for the same within a few cents as much as the petitioner.

Commissions issued, and much testimony was taken thereunder.

The defendant, (the trustee,) afterwards filed in the Court of Chancery copies of the following deeds of conveyance, viz. one from Frederick Mills to John C. Weems, dated the 25th of October, 1824, for all his claim and interest of, in and to, one undivided fourth part of a tract of land called Holloway's Neck, or Oliver's Preservation, &c. and another from Henry C. Drury, and Elizabeth his wife, to the said Weems, dated the 25th of October, 1824, for their claim and interest in and to one undivided fourth part of the said land, and also all their right and claim to one undivided fifth part of the residue of the said tract of land. Also a deed from John H. Lamon, and Charlotte his wife, (formerly Charlotte Johnson,) to Nicholas Brewer, Junior, the said trustee, and defendant, dated the 17th of May, 1826, for all their right, &c. in the said tract of land.

BLAND, C. (July Term, 1826.) The respondent objects, that this sale cannot be set aside in this summary way, but, that the pur-

chaser should have proceeded by bill. If the case, in which this sale was decreed to be made, had been entirely closed, and was no longer depending, then it would have been, not only proper, but necessary to proceed by bill; by which all the former litigating parties, with the trustee who made the sale, if living, might be again brought into Court, and have an opportunity of being heard to the extent of their respective interests. But, in the present instance, the parties are still here, and ready to sustain their interest. The matters in litigation, in this suit, having been determined, this property was decreed to be sold, and the proceeds brought in, that equity might be done
396 among the parties. The most summary and *economical mode in which these objects can be accomplished is certainly most proper, and ought to be pursued. Besides, the purchaser, whoever he may finally be determined to be, must make title under, and from the decree in this case; it is, therefore, obviously better, on his account, as well as for the parties in the suit, that all questions relative to the validity of the sale, should be concisely introduced into, and connected with that case from which he is to deduce his title. These reasons appear to be sufficiently satisfactory to sustain the present mode of proceeding, even if there were no precedents to justify it; but, it has long been the practice under similar circumstances to proceed in this way by petition. There is, therefore, no foundation for this objection to the mode in which this purchaser has brought his cause of complaint before this Court.

In this case, no fraud has been alleged or pretended; nor is it charged by the petitioner, that there has been any misrepresentation, or mistake. But it is alleged, and is proven and admitted, that the purchaser bought under an assurance of the trustee, that the title he sold should not be affected by a suit then depending, and which would be finally decided before the purchase money became due. That the suit alluded to has been determined; and by which it has been decided, that the parties, whose interests the trustee sold, were entitled to no more than three-fourths of the tract sold. And since the subject has been thus materially changed, the petitioner insists, that he ought not, any longer, to be held bound to fulfil the contract on his part.

It appears from the allegations and proofs, that this purchaser looked more to the title of what he bought, than to its quantity. He bought by the acre; he was to pay for no more than the trustee had a right to convey; and he was not to pay for any, until he got a title. He was willing to take the whole tract, if to be had; if not, as much as the trustee could convey. But, the subsequent conduct of the purchaser has removed every doubt as to the present cause of complaint. Since this sale, he has, himself, purchased three-fourths of the one-fourth, the loss of which he alleges has so mutilated the subject as entirely to change its character, and divest it of all its

value to him ; thus, furnishing the most satisfactory evidence
* of its having been his understanding and intention to pur- **397**
chase of the trustee the whole tract, or so much as he could get.
This Court, by its trustee, has sold, and can now convey to the pur-
chaser three-fourths of this tract ; to that extent this sale is a fair
one, and must be sustained ; and to that amount, therefore, the pur-
chaser will be compelled to complete his purchase.

But it now appears that the outstanding title to the one-fourth of
this tract of land, which was not covered by the decree, under which
the sale was made, was held in four shares. That three of them
have been conveyed to this purchaser, and that the other undivided
fourth, of this fourth part, has been conveyed to, and is now vested
in this trustee, for the express purpose of enabling him, for so much,
and so far, to make a good title to this purchaser ; and this trustee
now insists, that the purchaser should be compelled to accept this
title, to this portion, from him ; to pay for it according to the terms
of the sale ; and that the persons who have thus conveyed to him
their title, but, who are no parties to this suit, may be allowed to
receive their proportion of the purchase money in lieu of their share
thus conveyed through the trustee to the purchaser.

The Chancellor has repeatedly declared, that where a sale is
ordered by a decree of this Court, as in this case, the parties to a
contract made under such decree, are not the trustee and the pur-
chaser, but the Court and the purchaser. The trustee appointed to
make the sale is the mere agent of the Court—acting only as it
authorizes ; and continuing only during its pleasure. This Court is
the party contracting with this purchaser. But even supposing for
a moment, that the trustee is the contracting party ; he is so in his
representative, not in his individual character. In this case John H.
Lamon and wife, in whom was vested the right to the one-fourth of
the one-fourth of the whole tract, have conveyed their title to
Nicholas Brewer, Junior, this trustee, for the purpose of enabling him
to convey to this purchaser. Hence, it is evident, that if he were
compelled to accept this portion, his title would be deduced from two
distinct sources ; for three-fourths he would claim under the decree
of this Court, and take the title of the parties to it ; and for one-
sixteenth he would claim under the deed of Lamon and wife to
Nicholas Brewer, Junior.

* The case then resolves itself into this—A, covenants, for **398**
a valuable consideration, to convey a tract of land to B, upon
which A calls for a special performance ; B objects, that there is an
outstanding title in C, to which A replies, that C is ready and willing to
convey his title to B. In such case, B, having contracted to receive a
good title from A, certainly would not be compelled to receive a title
from any one else ; even although it might be as good as that which
could be made to him by A. All the authorities show, that the good
title must proceed altogether from him who covenanted to make it.

This purchaser, John C. Weems, bought of this Court. He contracted to receive such title as the Court could give him, from the parties to the suit in which the sale had been decreed, and none other. And this Court will not force upon him any other title, than that which was declared by its decree should be sold. And, on the ground of there having been no fraud, misrepresentation, or mistake in this sale; and because of its appearing to be in all respects fair and correct, the purchaser will be now compelled to complete his purchase to the amount of three-fourths only of the tract sold to him; but he will not be compelled to take, and pay for the one-sixteenth offered to him through the trustee of this Court, from Lamon and wife. Ordered, that the said sale, as reported, stand and remain fully ratified and confirmed to the amount of three-fourth parts of the tract of land, so as aforesaid sold. And to the amount of the said one-fourth thereof, according to the title of the same, as specified in the petition and proceedings, the said sale be vacated and annulled. Ordered also, that the petitioner be allowed the costs of his said petition, to be taxed by the register, and deducted from the amount of the purchase money wherewith he is chargeable.

From which order both the petitioner and trustee appealed to this Court.

The cases were argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and ARCHER, JJ.

Speed, for the appellant, in the first appeal. To show that a purchaser may have his purchase rescinded, he cited *Glover vs. Smith*, 1 *Desauss.* 433; *Chambers vs. Griffiths*, 1 *Esp. Rep.* 150; *Sugd.* 206, 209; 1 *Madd. Ch.* 419, 430; *Stapylton vs. Scott*, 13 *Ves.* 426, 427; 2 *Pow. on Cont.* 11, 12, 14, 23, 143, 144; *Fran. Max.* 10, s. 7; *Manning and others' petition*, Per JOHNSON, Chan. in 1824.

Brewer, Jr., the appellee in the first, and appellant in the second appeal, in person, cited *Sugd.* 183, 187, 189, 190; *Evans vs. Bicknell* 6 *Ves.* 175; *Drewe vs. Hanson*, *Ib.* 678; *Bromley vs. Holland*, 7 *Ves.* 27; *Langford vs. Pitt*, 2 *P. Wms.* 630; *Guest vs. Homfray*, 5 *Ves.* 818, 820; *Mortlock vs. Buller*, 10 *Ves.* 306; *Coffin vs. Cooper*, 14 *Ves.* 205; *Wakeman vs. The Dutchess of Rutland*, 3 *Ves.* 235; *Dorsey vs. Courtenay*, 3 *H. & J.* 483; *Abbott vs. Allen*, 2 *Johns. Ch.* 520; *Sugd.* 214; *Calcraft vs. Roebuck*, 1 *Ves. Jr.* 224; 1 *Fonbl.* 24, 25.

Magruder, on the same side. He admitted that the Chancellor had the power to set aside a sale where a proper foundation was laid, and where the Court had been imposed upon. After the report of the sale had been ratified, the contract of * sale was complete and except in the case of fraud, the sale is never set aside. *Scott vs. Nesbitt*, 3 *Bro. Ch. Rep.* 475; *Fergus vs. Gore*, 1 *Sch. & Lef.* 350; *Morice vs. The Bishop of Durham*, 11 *Ves.* 57. The persons who are interested in resisting the setting the sale aside must be made parties. *Matthews vs. Stubbs*, 2 *Bro. Ch. Rep.* 391,

(and note ;) *Wakeman vs. The Dutchess of Rutland*, 3 Ves. 235. In England the parties in the suit are the vendors, and they give the deed to the purchaser. It is not similar to the trustee here. The Master in Chancery there never conveys. He ascertains in whom the title is, which the Court directs to be sold. The purchaser never pays the purchase money until all the persons claiming the title conveys to him. Here the parties do not convey—that is done by the trustee who makes the sale. The parties to the suit are the vendors, and the Court and the trustee are the instruments of the law to enforce a sale, &c. It is not the contract of the Chancellor with the purchaser. With consent of the parties a sale may be set aside—the trustee has no interest in the question. It is of no sort of consequence how the title is acquired, if a good one can be given to the purchaser. He has no right to object that there is not a good title, unless he pays the purchase money. *Brasher vs. Cortland*, 2 Johns. Ch. 505.

The allegations in the petition are not those to which the proof applies. The petitioner cannot rely on the depositions of witnesses, which relate to facts not put in issue by the petition. If there had been fraud in the sale, yet if not alleged in the petition, the petitioner could not take advantage of it. *James vs. M'Kernon*, 6 Johns. 543, 559; *Lyon vs. Tallmadge*, 14 Johns. 501.

Taney, (Attorney-General,) for the appellant in the first, and appellee in the second appeal.

* 1. It was a purchase of the whole tract, and the trustee can convey only three-fourths of it. Is the purchaser com- **402**
pelled to take a title of undivided portions, when he purchased an entire estate? A purchaser will not be obliged to take an undivided estate, where he contracted for an entirety. *Sugd.* 214. The character of the estate must be that which was purchased. *Sugd.* 211, 212; *Drewe vs. Hanson*, 6 Ves. 678; *Poole vs. Shergold*, 1 Cox, 274. The entire estate was the whole inducement of the purchase made by the petitioner. The object was to get rid of the public road leading through his farm. Here will be various deeds of conveyance to make out the title, when it was the intention that one should answer.

2. Was there any thing in the conduct of the petitioner to vary the case, so as to compel him to take the three-fourths? Will his conduct be considered a fraud? It is not proved when he made the contract for the one-fourth. He purchased of Mills before the sale was made by the trustee. There is no evidence that he prosecuted the appeal referred to. He made a contract pending the appeal, and agreed to pay the costs. Was this such a proceeding as took away from him all equity on the present occasion? Suppose he did interfere, it could not alter the decision to be made by this Court. It is not a case similar to those referred to on the other side from *Vesey* and *Johnson's Reports*, where the purchasers acted with bad faith.

3. The petitioner having now one-fourth of the land, and the trustee enabled to convey to him the three-fourths, is he bound to comply with his purchase? When is the title to be perfected? Is it at the time of the decree for a sale, or at the time of the sale, or when the deed is given by the trustee? Here the trustee was authorized to sell the land of which Conner died seized. He had no right to sell the title of any other person. He could act in no capacity, under that decree, but as trustee. He could not buy in a title from a per-

403 son whose * title he was not authorized to sell, and compel the purchaser to take such title, whether it was considered as the contract of the parties, or of the Court of Chancery. The purchaser bought nothing more than the decree authorized the sale of. The Court of Chancery directed the sale of a clear title in the land ordered to be sold. There need be no covenants in the deed given by the trustee, because he sells under the decree a clear title—not merely the interest of the parties to the suit. The title derived by the trustee from Lamon and wife, does not come through the Court of Chancery. The petitioner purchased under a sale directed by decree of the Court of Chancery, and not from the trustee in his private character, but in his character as trustee under that decree. Achsah, one of the heirs, was dead in 1826 but died after the deeds which were exhibited were executed; and there is no deed from her and her husband, of her right and interest in the land, so that there is an outstanding title to one-sixteenth part, which no one can give a title to. *Hebburn vs. Auld*, 5 Cranch, 262, 275; *Halsey vs. Grant*, 13 Ves. 78; *Stapylton vs. Scott*, 1 b. 427; *Sugd. (New Ed.)* 213; *Drewe vs. Hanson*, 6 Ves. 679; *King vs. Bardeau*, 6 Johns. Ch. 38, 43, 44; *Wirdman vs. Kent*, 1 Bro. Ch. Rep. 140, (notes.) But it has been said that a Court of Chancery sells only the rights of the parties in the same manner as sheriffs do under sales made by them under writs of *fieri facias*. This is not so, the Court of Chancery sells a clear good title. *Ogilvie vs. Foljambe*, 3 Meriv. 53; *Abel vs. Heathcote*, 2 Ves. Jr. 100; *Staplyton vs. Scott*, 16 Ves. 272; *Biscoe vs. Perkins*, 1 Ves. & Beam. 493; *Sloper vs. Fish*, 2 Ves. & Beam. 145.

The possession of the purchaser was no waiver of title; and there could be no demand of the purchase money until the title was settled, under the agreement made at the time of the sale.

There can be no want of parties here, for this is a continuation of the case wherein the decree for a sale took place, and is a petition interposed, as is done in all other cases where the parties are in Court. *Sugd.* 45, 46, 47.

BUCHANAN, C. J. delivered the opinion of the Court. This is an application by a purchaser of land at a trustee's sale, to be **404** * relieved from his contract on the ground of disappointment in the main object of his purchase.

There was no fraud, concealment, or intentional misrepresentation on the part of the trustee, but the sale appears to have been made in perfect good faith. The pendency of the suit in Chancery by Drury and others for the same land, at the time of the sale, against Couner and others, was it appears, as well known to the petitioner, John C. Weems, as to Brewer, the trustee, and Weems purchased with a knowledge of that suit, the probable issue of which, neither had better means of knowing than the other. And the final decree of this Court after the purchase by Weems, in favor of the complainants in that suit, for one undivided fourth part of the land which had been sold to him as an entirety, but in which a tenancy in common was thus created, however worthy of consideration it might have been in a different state of things, furnishes, we think, under all the circumstances of this case, no sufficient ground for his being discharged from his contract.

The land was not sold for a gross sum, at a stipulated number of acres, but was bid for and sold by the acre, and the deficiency in the quantity supposed to have been sold, produced by the subsequent decree in the suit then depending, is not complained of or alleged as a cause for annulling the sale; but the apprehended interruption or obstruction of a road, which is stated in the petition to lead from the estate the petitioner through the premises intended to have been purchased, and which with the proximity of the two estates, is alleged to have been his only inducement to purchase, appears to be the only ground of complaint.

The existence of a road leading from the estate of the petitioner through the premises in question, which is alleged as an inducement to the purchase, is not made out in evidence. It does, however, appear in proof, that the possession of the disputed premises would furnish him with a convenient approach to a landing on the water for produce, which might have been an inducement to the purchase, and may be what was meant by the petitioner, though it is not so stated. And if so, any difficulties attending the enjoyment of such approach to the landing growing out of the decree of this Court, directing a * conveyance to Drury, and others, of an undivided fourth part of the land, would so far disappoint the object of **405** the purchaser. It is proved also, but not alleged in the petition as an inducement to the purchase, or a ground for being relieved from it, that there is a road leading through the estate of the petitioner, to the land in question, which is injurious to that estate, and that there is no way of getting to it by land, except by going through that estate. That may be a great annoyance, but a discharge from the contract, if asked for on that ground, would not, in that respect, better the condition of the petitioner, as the road through his estate would still remain.

But on no ground does it seem to us that the petitioner has presented himself in an attitude before this Court, which entitles him to be discharged from the entire purchase.

The sale was made in perfect good faith; and whether the inducement to the purchase was a convenient approach to the landing mentioned in the testimony, which might be better secured, by the possession and ownership of the entire estate, than of an undivided part; or whether his object was, to acquire by the purchase a control over the road leading to that land through his other possessions, it would seem not to be very material, whether the object was effected by a purchase of the entire interest from the trustee, or of an undivided part from him, and the residue from others having the right.

If, without the possession and ownership of the entirety, the main object of the purchaser would be disappointed, and it appeared that he could not procure the undivided fourth part decreed to Drury, and others, a different case would be presented. But here the petitioner has bought up the rights of those interested in three-fourths of the undivided fourth part of the land decreed to Drury, and others, and the trustee is in a situation to make him a title to the remaining fourth, or sixteenth part of the whole; so that he may, if he chooses, have title to the entire estate, and the whole object of the original purchase be gratified, with this only difference, that the title to the one undivided fourth part, would not be held under the decree, in virtue of which the sale was made by the trustee. And if the sale should be set aside, the evils which the purchase was intended to
406 obviate, would return upon the petitioner. Which *shows it is not because the object of the purchase is defeated, that he wishes to be relieved, from it, but that he seeks to be discharged from his contract, for some other reason not disclosed. And without seeing that the object of the purchase is defeated, and that the petitioner would be injured by the contract being enforced, he cannot be permitted to abandon it. If every minute and critical objection to a judicial sale was suffered to prevail, it would be attended with much inconvenience and embarrassment. A purchaser claiming to be discharged from his contract, should make out a fair and plain case for relief; and it is not every defect in the subject sold, or variation from the description, that will avail him. He will not be suffered to speculate at such sales, and if he happens to make a bad bargain, to turn round and abandon his purchase on some nice but immaterial objection. But if he gets substantially what he bargains for, he must take a compensation for the deficiency.

Chancery weighs the object and inducement of the purchaser, and looking to the merits and substantial justice of each particular case, if the sale be fair, relieves or not from the purchase, according as the character of the transaction, and circumstances may appear to require.

In this case, whether the gaining a convenient approach to the landing, or the control of the road leading through the estate of the petitioner, to the land sold, or both, formed the inducement to the purchase, it is evident, that the quantity of land, whether more or

less to be obtained from the trustee, was not a material consideration. It is admitted, that the trustee can make a good title under the decree to three-fourths of the land sold; the petitioner has already secured to himself three-fourths of the remaining fourth part; and it appears, that the trustee is placed in a situation, by a deed from the party having the right, to give a title to the other fourth of that part, being one-sixteenth of the whole, which, (if the petitioner chooses to accept it,) will, with the three-fourths ready to be conveyed under the decree, give him title to the whole land, and secure to him the entire object of the purchase; and that being secured without loss to the petitioner, he cannot be discharged from his contract, when the enforcement of it, subject to a proportionate deduction for that which he has purchased from others, will * do him no injury. The main object of the purchase, as alleged, is of a **407** character to render it unimportant from whom the title comes, if that object is gratified. And the attempt to get rid of the purchase, on the ground that the trustee can only make him a title under the decree, to three undivided fourth parts of the land, when he supposed he was buying the entirety, has an unfavorable aspect; seeing, that having purchased from others, three-fourths of the other undivided fourth, and the trustee being in a situation to make him a title to the residue, he may have the entire estate in the whole land, which he alleges it was his purpose to have obtained.

Besides, it does not appear when it was that the petitioner contracted for the undivided interest of some of the complainants in the suit depending at the time of the sale. If before the sale, it seems clear, that he was willing, and intended to obtain from the trustee, any portion he might be able to make title to: and if after the sale, his intermeddling as he did, and purchasing up three-fourths of the undivided fourth decreed to Drury, and others, might, if this sale was set aside, have the effect to embarrass, and throw difficulties in the way of an advantageous re-sale to the prejudice of those concerned in the proceeds, whose interests ought to be protected, when it can be done, as we think, without injustice or injury to the petitioner.

Order affirmed.

THE STATE vs. CASSEL, *alias* BAKER.—June, 1828.

In an indictment founded upon the Act of 1809, ch. 138, for stealing a bank note, it is sufficient to describe the note as a bank note for the payment of, &c. and of the value of, &c. Nothing more is required than to charge the offence in the language of the Act. (a)

(a) Approved in *State vs. Dent*, 3 G. & J. 12; *Bode vs. State*, 7 Gill, 332; *Parkinson vs. State*, 14 Md. 198.

Where an indictment is founded upon a single statute, and not upon any other in conjunction with it, it is clear that its conclusion must be in the singular.

But where an offence is created by one Act of Assembly, and the punishment prescribed or affixed by another, the better opinion is that its conclusion should be against the Acts of Assembly.

Bank notes are considered and treated as money, and the true rule of their value as respects the graduating the offence of stealing, is the sum which upon their face they promise to pay.

408 * ERROR to Baltimore City Court, issued on the part of the State, for the removal of a criminal prosecution. The indictment was as follows: "State of Maryland, City of Baltimore, to wit. The jurors of the State of Maryland for the body of the City of Baltimore, do on their oaths present, that John Cassel, late of the said city, yeoman, otherwise called Thomas Baker, together with Jacob W. Callip, on the first day of October, in the year one thousand eight hundred and twenty-seven, with force and arms, at the city aforesaid, one bank note for the payment twenty dollars, and of the value of twenty dollars, one other bank note for the payment of," &c. "and divers other bank notes, to wit, sixteen bank notes for the payment of divers sums of money, in the whole amounting to a large sum of money, to wit, the sum of eighty dollars, and of the value of eighty dollars, of the bank notes and property of Oran D. Crane, then and there being found, feloniously did steal, take and carry away, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State." The prisoner pleaded not guilty, and issue was joined. The jury found the prisoner guilty; and he moved the Court in arrest of judgment, assigning the following reasons: 1. The time at which the offence is alleged to have been committed, is not sufficiently designated. 2. The bank notes ought to have been alleged to have been the notes of a bank or banks established under charter from the Government of the United States, or some particular State. In the indictment this is not done. 3. The conclusion of the indictment should have been against the Acts of Assembly, and not against the Act as is alleged in the indictment. 4. That the seventh clause of the sixth section of the Act of 1809, ch. 138, is not sufficiently explicit to enable the Court to pass any sentence on the prisoner, because it does not direct in what manner the value of the bank note, *a chose in action*, shall be ascertained; and unless it be ascertained, the amount of punishment cannot be determined. And neither the Court nor jury, unless authorized by law, can annex a value to *a chose in action*; and, therefore, the finding the value by the jury, is of no legal effect. Baltimore City Court arrested judgment on the verdict, and discharged the prisoner; and a writ of error was brought on behalf of the State.

* The cause was argued before BUCHANAN, C. J., EARLE, 409
STEPHEN, and ARCHER, JJ.

Taney, (Attorney-General,) and *Gill*, for the State, contended,
1. That the allegation of the day of the month, the month, and
current year, is a sufficient allegation of the time laid in an indict-
ment charging the commission of an offence.

2. The Act of 1809, ch. 138, s. 6, sub-s. 6, makes it felony to steal
any bank note, and in charging such a felony in an indictment, it is
sufficient to aver "one bank note of the value of," &c.

3. That in the conclusion of an indictment on a statutable offence,
whether that offence be created or punished by one or more statute,
it is sufficient to conclude against the form of the Act of Assembly.

4. That bank notes have now an intrinsic value, as much fixed as
other articles of trade, and that, therefore, on an indictment charg-
ing a theft of them, the jury have the same right, and are under the
same obligation to find the value thereof, as of any other stolen
property.

5. That as the standard of punishment for the crime of theft
depends on the value of the thing stolen, but which value does not
enter into the constitution of the crime of larceny, the jury, without
express authority to enable the Court to supply such standard, may
in this, as in other cases of larceny, find the value of the subject
stolen.

In their argument on the several points raised, they cited the Acts
of Assembly of 1793, ch. 35; 1797, ch. 96; 1799, ch. 75; and 1809, ch.
138, s. 6. 2 *Russell on Crimes*, 1147, 1148, 1149; 2 *East's P. C.* 597,
598, 602; 1 *Chitty's C. L.* 238, 239, 240, 339, 340, 194, 179; *Towson*
vs. The Havre de Grace Bank, 6 H. & J. 53; *United States vs. Good-*
ing, 12 *Wheat.* 472.

No counsel appeared for the defendant in error.

STEPHEN, J. delivered the opinion of the Court. This case comes
up on a writ of error directed to Baltimore City Court; and the
question presented for the adjudication of this Court, arises upon
the sufficiency of the matters charged in the indictment * to 410
sustain the prosecution. The grounds of the motion in arrest
of judgment have been examined and carefully considered, and the
result of our most mature deliberation, has been a conviction, that
they did not warrant the judgment rendered in the Court below.
This is an indictment founded on the Act of 1809, ch. 138, commonly
called the Penitentiary Law, which provides, that larceny of any
bank note or notes shall be punished in the same manner as larceny
of goods and chattels. This Act speaks of a bank note or notes as
the subject of larceny, without stating that they must be the notes
of any particular bank or banks; and it would, therefore, seem to be
reasonable, and we think the law requires nothing more in this case
than to charge the offence in the language of the statute. In this

respect the Act of 1809, ch. 138, differs from the Act of 1793, ch. 35, which mentions the character or description of the banks by which the notes must have been issued; but upon that subject the Act of 1809 is totally silent. The prosecution being bottomed upon that Act alone, and not upon any other in conjunction with it, it is clear, beyond controversy, that the conclusion is in strict conformity with the established principles of criminal pleading. Where an offence is created by one statute, and the punishment is prescribed or affixed by another, we think the better opinion is, that the conclusion should be *contra formam statutorum*. See 2 *Hale's Pleas of the Crown*, 173, where he says, if one statute be relative to another, as where the former makes the offence, and the latter adds a penalty, the indictment ought to conclude *contra formam statutorum*. In support of which principle he refers to *Dingley vs. Moor*, *Croke Elizabeth*, 750. To the same effect, see 3 *Bacon's Abr. tit. Indictment*, 571. Upon the subject of the sufficiency of the description of the notes, see also 2 *Russell on Crimes*, 1149, 1150. By an express decision of this Court in *Towson vs. The Havre de Grace Bank*, 6 *H. & J.* 53, bank notes are considered and treated as money; and it would, therefore, seem to be strange that no rule or principle is held to exist, by which a jury could ascertain their value for the purpose of graduating the offence charged in the indictment. We think the true rule is to look for that purpose to the sum which upon the face of them they promise to pay. For these * reasons, without entering further
411 into the subject, the judgment of Baltimore City Court is reversed.
Judgment reversed, and procedendo awarded.

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SMITH vs. EDWARDS.—June, 1828.

S. assigned his entire stock of goods to E. but retained possession of it. went on with his business as usual, and made purchases from J. which when received into his store, were placed among the merchandise assigned to E. After some time S. failed, and E. took possession of all the goods in his store, (among which were some of the articles received from J.) sold them, and applied the proceeds to the payment of a debt due him by S. and of endorsements made by him for S. In an action by J. against E. for the goods sold and delivered to S.—*Held*, that there was no evidence from which the jury might infer a partnership, an agency or fraud between E. and S. so as to make E. liable. (a)

APPEAL from Baltimore County Court. Action of *assumpsit*. The declaration contained several counts—one for sundry articles properly chargeable in account, &c. one for goods sold and delivered, &c. and the usual money counts. The defendant, (now appellee,) pleaded *non assumpsit*, and issue was joined.

(a) See *Hudson vs. Warner*, *post*, m. p. 415.

At the trial the plaintiff, (the appellant,) gave in evidence that William Stansbury was a merchant, residing in Baltimore, occupying a store therein, in which he was accustomed to sell various articles of hardware, dry goods and merchandise, which he carried on in his own name, and for his own account, for several years previous to, and on the 30th of March, 1824, and until the month of August of that year, during all which time he was in good credit, and was in the frequent habit of purchasing merchandise for his said store on his own responsibility. The plaintiff further gave in evidence, that on the said 30th of March, 1824, the said William Stansbury executed and delivered to the defendant the following bill of sale: "Know all men by these presents, that I, William Stansbury, merchant of the City of Baltimore, for and in consideration of the sum of one dollar current money of the United States, to me in hand paid by Elizabeth Edwards of Baltimore County, at or before the sealing and delivery of these * presents, the receipt whereof I, the said William Stansbury, doth hereby acknowledge, have **412** granted, bargained and sold, and by these presents doth grant, bargain and sell, unto the said Elizabeth Edwards, her executors, administrators and assigns, the following negroes, to wit: Negro George, negro Nance, Elizabeth and Henry, also a judgment I have obtained against Andrew Magrew in the State of Ohio; also my four-wheel carriage, gig, all my household furniture of every kind and description in the dwelling-house that I at present occupy; and all my stock of goods on hand, consisting of a variety of hardware, groceries and dry goods. To have and to hold all and singular the said negroes, household furniture, and stock of goods, and all and singular the other personal property above mentioned, and bargained and sold as aforesaid, unto the said Elizabeth Edwards, her executors, administrators and assigns, forever. And I, the said William Stansbury, for myself, my heirs, my executors and administrators, all and singular the said negroes, household goods, and other personal property, unto the said Elizabeth Edwards, her executors, administrators and assigns, against me the said William Stansbury, my executors and administrators, and against all and every other person or persons whatsoever, shall and will warrant and forever defend by these presents." Signed and sealed by the said Stansbury on the 30th of March, 1824, and by him, on the same day, acknowledged before a justice of the peace for Baltimore County.

The plaintiff further gave in evidence by Thomas J. Barry, that he was, on the said 30th of March, long before and until the month of August, 1824, a clerk in the employ of said William Stansbury; that on the said 30th of March, 1824, said Stansbury had in his store hardware and other merchandise on sale, to the amount of from 1,000 to 3,000 dollars; that in the months of April and May, 1824, the goods and merchandise specified in the following invoices, were sold and delivered by the plaintiff to the said Stansbury.

“Baltimore, April 23d, 1824.

Col. William Stansbury, Bot. of John W. Smith.” (Then follows an account amounting to \$204.08.) Also, “Col. William Stansbury, Bot. of John W. Smith. Baltimore, * May 13th, 1824.”

413 (Then follows another account amounting to \$110.00) That the said goods and merchandise were received into the said Stansbury's store, accompanied with the said invoices, which goods were examined by the witness, compared with the invoices, found to agree, and the goods were placed on the shelves in the said store occupied by Stansbury, along with the other goods in the said store; and all the said goods were indiscriminately offered for sale as usual, and part of the goods purchased from the plaintiff were sold from time to time with the other goods, and a part of them remained in the store in the early part of August, 1824. During all which time the witness had no knowledge of the bill of sale above mentioned, and considered himself as the clerk of said Stansbury, and all the goods in the said store as belonging to said Stansbury. That the witness was first informed that the defendant had a bill of sale for the goods in Stansbury's store, in the early part of August, 1824, by Mr. Richard Frisby, the son-in-law of the defendant, who then, in her name, as her agent, demanded of the witness the key and possession of the store, which the witness refused to deliver until directed by Stansbury. That Stansbury on the same day directed the witness to deliver the key to Mr. Frisby, which he did; and that all the goods which remained in the store, including a part of those purchased from the plaintiff, but what proportion the witness does not know, were shortly after sold by Frisby, the agent of the defendant, at auction. And evidence was given, and it was admitted, that the proceeds of the sale at auction were about \$2,000. Which amount was received by an agent of the defendant, and part of it retained in satisfaction for money lent by her to Stansbury, and the residue applied to the payment of notes of Stansbury on which the defendant was security, as drawer or endorser, for the accommodation of Stansbury. The plaintiff also, by Edward J. Richardson, proved that the witness, as clerk to the plaintiff, made out the two invoices above inserted, and that the goods therein described were sold and delivered by the plaintiff to Stansbury, at the respective dates mentioned in the said invoices. The plaintiff further offered in evidence, that the money for which the goods were

414 * sold at retail, was received by Stansbury during the months of March, April, May, and until the time when the goods in the store were delivered to Mrs. Edwards, and by him applied to the payment of his general debts, notes and household expenses, and to the reduction of notes which Mrs. Edwards had drawn or endorsed for the use and accommodation of said Stansbury. And the witness of the plaintiff, upon being asked by the plaintiff's counsel, whether there was any agreement when the bill of sale was executed, or at

any other time, that the proceeds of the goods, or any part thereof, was to be received by Mrs. Edwards, the defendant, or applied to her benefit? replied, that none such was made or existed. That he himself had attended to the transaction for Mrs. Edwards, that he made none such, nor had she received any part thereof. Upon the cross-examination of the plaintiff's witness by the defendant's counsel, he stated, that a note of Stansbury's was protested for non-payment the day before the demand was made for the key; he also stated that he himself was on a note of Stansbury's, and that Stansbury, in the said month of August, after the sale of the goods, transferred to the witness his books of accounts of the business, and the accounts, to him, to secure the debt for which he was so responsible. The defendant then prayed the opinion of the Court, and their direction to the jury, that the plaintiff upon the evidence so given was not entitled to recover—1st. Because there is no evidence offered to justify the jury in finding the existence of any copartnership between the defendant and William Stansbury. 2d. Because there is no evidence offered to justify the jury in finding that the said store or business was carried on by Stansbury for the benefit, and on account of the defendant, and that Stansbury was constituted her agent for that purpose. 3d. Because there is no evidence to justify the jury in finding that the said goods, wares and merchandise, mentioned in the invoices, were sold and delivered to the defendant by the plaintiff; and no evidence of any combination on the part of the defendant to obtain the plaintiff's goods by fraud. Which opinion and direction the Court [HANSON and WARD, A. J.] gave accordingly. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this Court.

* The cause was argued before BUCHANAN, C. J., EARLE, 415
STEPHEN, and DORSEY, JJ.

Raymond, for the appellant, contended, 1. That it was competent for the jury to infer from the evidence in the record, that Stansbury was the agent of the defendant below, and that the goods which he purchased of the plaintiff were for and on account of the defendant, and came to the defendant's possession; and that the Court below erred in their instruction to the jury, that the plaintiff was not entitled to recover. 2. That the Court erred in not leaving the case to the jury upon the evidence. *Bank of Washington vs. Triplet*, 1 *Peters' Rep.* 31.

Williams, (District Attorney of U. S.) for the appellee, cited *Davis vs. Davis*, 7 *H. & J.* 36. Judgment affirmed.

HUDSON *vs.* WARNER & VANCE.—June, 1828.

A bill of sale of personal property made upon a good consideration, as, to indemnify the grantees against suretyships entered into, and to be entered into, is available between the immediate parties to the instrument, although not recorded. (a)

Where a mortgage was executed of the entire stock in trade in the mortgagor's store, and three years afterwards, the stock in the same store was sold by trustees for the benefit of his creditors, in the absence of evidence, that in the intermediate time, there was an entire sale of the original stock, or that the part sold was replaced, or that any new stock was purchased and mingled with the old, it will be intended, that the sales made by the trustees, were of the remnant of the stock of goods mortgaged. (b)

The grantee of a second mortgage of personal property recorded in time, with notice of a prior mortgage which was not duly recorded, is bound by the equitable rights of the first mortgagee, unless upon inquiry into

(a) Affirmed in *Clagett vs. Salmon*, 5 G. & J. 346. See *Dorsey vs. Smithson*, 6 H. & J. 57, note.

(b) Cited in *Hamilton vs. Rogers*, 8 Md. 315, where it was held that a mortgage of goods in a store providing for all renewals and substitutions of the same, the object being to include not only the articles then in the store, but whatever should be at any time therein in the course of the mortgagor's business, could not convey subsequently acquired goods so as to give the mortgagee a right of action at law against a party seizing them. This case is affirmed in *Rose vs. Bevan*, 10 Md. 467; *Wilson vs. Wilson*, 37 Md. 11, and approved in *Griffith vs. Douglass*, 73 Maine S. C. 26, Albany, L. J. 211. A mortgage of goods in a store, "and also other property and effects which may hereafter be brought into said building by the mortgagor, or may be substituted by him in lieu of that hereby mortgaged," conveys to the mortgagee no interest in, or lien on, such goods as were subsequently purchased out of the proceeds of the sale of those mortgaged. *Rose vs. Bevan*, *supra*. In *Wilson vs. Wilson*, 37 Md. 11, the Court said that the question as to how equity would deal with a clause of this character in a mortgage or bill of sale was not before them, and that therefore they had nothing to do with the law as settled in *Pennock vs. Coe*, 23 Howard, 117; *Langton vs. Horton*, 1 Hare, 549, and other cases to the like effect. In an article on mortgages of future personal property, 6 *Southern Law Review*, 253, it is said that in equity, "while such mortgage itself does not pass the title to such property, it creates in the mortgagee an equitable interest in it, which will prevail against judgment creditors and others, although the mortgagee has not taken possession of the property, and the mortgagor has done no new act to confirm the mortgage. The ground of the doctrine is that the mortgage, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being held as trustee for him, in accordance with the familiar maxim that equity considers that done which ought to be done." Citing, among others, the cases of *Beall vs. White*, 94 U. S. 384; *Butt vs. Ellett*, 19 Wall. 544; *Gregg vs. Sanford*, 24 Ill. 17; *People vs. Bristol*, 35 Mich. 28; *McCaffray vs. Woodin*, 65 N. Y. 459.

the nature of his claim, the first mortgagee had led him to believe, that his incumbrances were removed, in which case, equity would never interpose to invalidate his legal title. (c)

The Act of 1729, ch. 8, had for its object the suppression of secret sales; by demanding that transfers should be recorded, it was intended that notice should be given, that no one might be injured, or deluded, by secret and unknown conveyances. (d)

Its object then being to protect creditors from prior secret conveyances, * any such creditor who had notice of any such incumbrance, could not be considered as falling within the class for whose benefit that Act was passed. **416**

The retention of possession of personal property, by a vendor, will not contaminate his transfer, where his deed showed, that the sale was not to have its completion immediately, but was prospective to a future event, till that future time, his possession is entirely consistent with his deed.

The failure of a mortgagee of personal property, to take possession at the time of the forfeiture, as stipulated in the mortgage, does not vitiate a deed, which in its inception was valid and effectual.

APPEAL from the Court of Chancery. The bill of the complainants, W. Warner and W. Vance, (now appellees,) stated, that on the 4th of February, 1820, having lent to and endorsed for J. and T. Vance divers promissory notes to considerable amounts, which were negotiated for the use and benefit of the said J. and T. Vance, in consideration thereof, and for the purpose of securing the payment of the said notes, and of other notes which might thereafter be lent and endorsed by the complainants, or either of them, to the said J. and T. Vance, whenever payment thereof should be required by the complainants respectively, the said J. and T. Vance agreed to execute a certain deed of trust or mortgage. In pursuance of which agreement, the said J. and T. Vance on the said 4th of February, 1820, bargained, &c. unto the complainants, all and singular the books, stationery, goods, wares, merchandises, effects and property, of or belonging to the said J. and T. Vance, situated or being in the store numbered 178, then occupied by them, and standing on the north side of Baltimore street, &c. and every the debts and sums of money due and owing or payable to the said J. and T. Vance, and all books of accounts, bonds, bills, &c. Provided that if the said J. and T. Vance, their executors, &c. should, whenever thereto required by the complainants, well and truly pay, &c. all the promissory notes that had at that time been lent to, or endorsed for them by the complainants, respectively, as all that might thereafter be so lent or endorsed, then the said instrument of writing to be void. That it was also provided by the said instrument of writing, that

(c) Affirmed in *Price vs. McDonald*, 1 Md. 415, 419. Distinguished in *Gill vs. Griffith*, 2 Md. Ch. 285. See *Hampson vs. Edelen*, 2 H. & J. 55, note; *Pannell vs. Farmers Bank*, 7 H. & J. 158; *Alexander vs. Ghiselin*, 5 Gill, 138.

(d) See *Clary vs. Frazer*, 8 G. & J. 398; *Kreuzer vs. Cooney*, 45 Md. 582.

if default should be made by the said J. and T. Vance in
417 payment of the said notes, then the said assignment * was
declared to be made in trust, that the complainants
should sell and dispose of at public auction, &c. all the said
property; and the proceeds, when received, to be applied to the pay-
ment of the said notes, and the balance, if any, to be paid to the said
J. and T. Vance. That by the said instrument of writing the com-
plainants were constituted attorneys to collect, recover and receive,
all the debts and sums of money so transferred and assigned for the
said trust, &c. They further charged that the complainants had
then lent to, and endorsed notes for the said J. and T. Vance, and
had since renewed the said notes, and lent and endorsed other notes
for them to a very large amount, &c. That the complainants find-
ing their responsibility very great, and the banks requiring large
reductions to be made on the said notes as they became due, called
on the said J. and T. Vance, and required them, agreeably to the
provisions of the said instrument of writing, to pay, take up and
retire, the said notes, which they refused to do, and have never
done; but the complainants had been obliged to take up the said
notes, and from their own funds. The bill also charged, that in the
month of March, 1822, the complainants called on the said J. and T.
Vance for a delivery of the effects and property mentioned and con-
tained in the said instrument of writing, they being advised, that a
delivery of them was necessary. That the said J. and T. Vance did
not object thereto, but on the contrary, put the complainants into
possession thereof, and permitted them to take an inventory of the
effects on hand. That the complainants, confiding in the honesty
and fidelity of the said J. and T. Vance, permitted them to remain
in the said store, and as the agents of the complainants, to sell any
articles they could, with the understanding that the proceeds should
be paid to the complainants in part liquidation of the notes they
had respectively taken up and retired for the said J. and T. Vance.
The bill also stated, that T. Vance, one of the said firm of J. and T.
Vance, on the 18th of May, 1822, executed an instrument of writing,
purporting to be a bill of sale, and thereby, in the name of J. and
T. Vance, conveyed to B. and H. Hudson, the property before con-
veyed and delivered to the complainants, the said B. and H. Hud-
son having full knowledge of the bill of sale so executed by the said
418 J. and T. Vance to * the complainants. That since then the
said B. Hudson and T. Vance have departed this life. That
J. Vance, the surviving partner of J. and T. Vance, by consent of
all parties interested therein, executed an instrument of writing to
A. Neale, F. Lucas, and J. J. Donaldson, in trust for the creditors,
of all the effects and property, debts, &c. belonging to the said firm,
with the understanding that that conveyance should not prejudice
the prior claimants. That the said trustees have sold the said effects
and property, so conveyed to them in trust, and have the proceeds

in their hands ready for distribution. Prayer, that the said J. Vance, A. Neale, F. Lucas, J. J. Donaldson, and H. Hudson, may answer, &c. and that A. Neale, F. Lucas, and J. J. Donaldson, may give an account of the sales of the property, &c. That the net proceeds of the said sales of the effects and property, as well as the said books of accounts, bonds, &c. due and owing to the said J. and T. Vance prior to the said instrument of writing, be brought into Court, and delivered to the complainants; and for general relief, &c.

The answer of H. Hudson, survivor of B. Hudson, of the late firm of Hudson & Co. of Hartford, in the State of Connecticut, stated that J. and T. Vance, being justly indebted to the late firm of Hudson & Co. in the sum of \$3,888, for books and stationery theretofore sold and delivered to them by the said Hudson & Co. as well as for money advanced for them, &c. did, on the 18th of May, 1822, sell and deliver to this defendant all the books, goods and stock in trade, of the said J. and T. Vance, then in the store No. 178 Market Street, Baltimore, and in the rooms and warehouses adjacent thereto; and also all the books, stationery, and other property, in which the said J. and T. Vance had any interest, then in the possession of W. Warner, or any other person or persons whatsoever. That when the defendant obtained the said bill of sale of the said property, the said T. Vance was alone in possession thereof, and that the sign of J. and T. Vance was suspended over the door of the said store; and the said T. Vance made delivery thereof, as in the said bill of sale is stated, viz. "One set of Gil Blas, and one set of Sterne's Works, in the name of the whole of the said property so transferred, and as a token of the manual delivery of the whole, to the said Hudson & Co. * at the date of this assignment." And also of the key of the said store, to C. Mitchell, as the agent and attorney of the de- 419 fendant, on the day of the sale thereof, and the same was afterwards delivered to the said Vance, who received the same expressly as the agent and trustee for Hudson & Co. only. And the bill of sale was on the same day, left with the clerk of Baltimore County Court, to be recorded. That the bill of sale which is set up and pretended by the bill of complaint of the complainants, was collusive, fraudulent and void, the same having been more than twenty days unrecorded, although the vendors were in possession of the goods and books thereby pretended to be sold; and further, that the said W. Warner, nor the said W. Vance, had not then, as the defendant believed, paid any part of the money for which they now pretend to have become security for, nor were they *bona fide* creditors of the said J. and T. Vance at that time. The defendant denies, that at the time he obtained the said security by the said bill of sale, he had any notice of any previous legal or equitable lien or incumbrance upon the said property therein mentioned, in favor of the complainants, or either of them, or of any other person or persons, except the landlord of the premises, for rent; nor had he any notice of any previous

delivery or pretended delivery thereof, into the possession, or disposal of the complainants, or either of them, or of any other person on their account, excepting only the book of accounts of the firm of J. and T. Vance, and other evidences of outstanding debts due to the said firm, which are referred to in the defendant's bill of sale, as in the possession of W. Warner, which as the said T. Vance then represented to the defendant, amounted to the sum of \$40,000 and upwards, and were more than sufficient to pay all the debts of the said firm; but that the said books, and other evidences of debts, were then unjustly withheld from his possession and control by the said W. Warner. That the said Vance proposed to transfer to the defendant the same, together with his said stock and books, then in his said store and warehouses, as additional security for his said debt. That the defendant previous to taking his said bill of sale, inquired of the said T. Vance, if there were any outstanding incumbrances on the said property, and was informed * by him, that

420 endorsements had heretofore been made by Warner for J. and T. Vance, and a contract of indemnity given to him, accompanied with a bill of sale upon some part of their property, but what part he did not state, but said that Warner had never been called upon to pay any of the notes of J. and T. Vance, and that the security which had thus been given to him, and the said pretended bill of sale, were of no avail, and had not been recorded, but were null, fraudulent and void; and that the same could not, therefore, be rightfully enforced against the said J. and T. Vance, or any of their creditors. That the same was founded upon no valuable consideration, and could not impair the security he then proposed to give to the defendant, even as to the books of accounts and securities then in the hands and possession of Warner, and much less, incumber, in any way, the books and stationery then in the said store No. 178 Market street, and the rooms and warehouses adjacent thereto, which he then agreed to transfer to the defendant by the bill of sale as aforesaid, and whereof the said Vance then appeared, and represented himself to be in the sole and exclusive possession, of, for and on account of the firm of J. and T. Vance, and not a trustee to or for any other person or persons. And the defendant verily believed the information so given to him by the said Vance; but for greater certainty therein, previous to his taking the said bill of sale, and upon the day it bears date, caused search to be made in the clerk's office of the County Court of Baltimore, for the record of the said pretended bill of sale, in order to ascertain, if possible, what property it included, and whether the same was valid; and no such record being then found, and, as the defendant believed, not being then recorded, he concluded, as he lawfully and equitably might and ought to have done, that no valid bill of sale affecting the said property could be outstanding, either in favor of the said Warner or of any other person or persons so as in any way to impair the security the said

Vance then proposed to give to the defendant upon the said books, &c. then in the said store, and warehouses adjacent thereto, whereof the said Vance then appeared to have, and as the defendant then verily believed, had the entire and exclusive control and disposal; and under this impression and belief, * the defendant took and received the said security. The **421** answer further stated, that the defendant had been informed that the fund sought by the complainants, as in the hands of the trustees, was raised entirely and exclusively from the sale of the said books, &c. so as aforementioned transferred to the defendant by the said bill of sale. The defendant, in his said answer averred, that at the period aforesaid, and before he obtained the said security from the said Vance, but on the same day, the said W. Warner knew that the defendant had a large claim against the said J. and T. Vance, and conversed with the defendant respecting the same; but gave no notice or intimation to the defendant that he had any lien or claim, or bill of sale, upon the said goods, books, stationery, or stock in trade, in the said store and warehouses; but from the general tenor of his conversation with the defendant, the defendant was led to the impression that the said J. and T. Vance had given no security whatever to the said Warner, for what he pretended to claim against them. That if the pretended claim of the complainants, under the pretended bill of sale, as now set up, is established, the defendant will be defrauded out of his just and honest debt, which he trusted had been fairly and *bona fide* secured by the bill of sale to him. That he verily believes the complainants are not creditors of J. and T. Vance to the amount set forth in their bill of complaint; and he prays that they may prove the true amount thereof, and when and at what time, and on what account, any advances were made by them for the said J. and T. Vance, &c. and that the said bill of sale to the complainants may be declared null and void; and that the said trustees may be decreed to pay the defendant the proceeds of the said goods, &c.

The answer of J. Vance, admitted the execution of the bill of sale to the complainants, and for the consideration therein expressed; and that a large amount of notes so lent to, and endorsed by, the complainants respectively, were not paid at maturity, by the firm of J. and T. Vance, and were either paid by the complainants, or renewed in their own names. That he was not in Baltimore when the bill of sale, said to be executed by T. Vance, in the name of the firm, to B. Hudson and H. Hudson, was made, and which, if executed, was without * his concurrence or approbation. That at the request of the creditors, &c. he executed the bill of sale to A. Neal, &c. **422**

The answers of the other defendants do not seem to be necessary, as to the question decided in this case. Commissions issued, and much testimony was taken thereunder, and the cause was argued and submitted for decision.

BLAND, C. (July Term, 1825.) The facts and circumstances in this case are sufficiently obvious as regards the question to be decided, and, therefore, need not be digested and stated.

It is said that every case on the Registry Acts both in England and Ireland, which has been brought before a Court of equity, has been determined on the ground that those Acts do not affect the great fundamental principles of equity; but that every purchaser, claiming under a registered deed, is left open to any equity which a prior purchaser or incumbrancer may have. There seems to be nothing in any of our Acts of Assembly requiring conveyances of real or of personal property to be recorded, which should induce a Court of equity of this State to consider them, as in this respect, at all different in their effect and operation from the Registry Acts of England and Ireland. Indeed, it may be strongly inferred from the language of the Legislature itself, in the Act for enlarging the powers of the High Court of Chancery, that all those Acts of Assembly, whether they relate to the recording of deeds for real or for personal property, are to be construed as those of England and Ireland have been, in relation to any prior equity.

It will, therefore, be assumed as a settled principle, that a person claiming property under a deed or conveyance, which has been duly executed and recorded, must take it subject to all other claims, of which he has had actual notice before the execution of his deed. Because after such notice, the accepting and recording of a conveyance, must be considered in equity as fraudulent, since the party actually had that notice which it was intended by the Act of Assembly he might have had by the recording of the conveyance of the prior claimant. But then to affect a record deed by notice of a deed unduly recorded, or one which has not been in any way recorded, the holder of the * regularly recorded deed must have had actual
423 notice, and it must be clearly proved. For no mere rumors, or even strong suspicion of notice, will gratify a Court of Chancery in breaking in upon the Acts of Assembly, which require deeds to be recorded. In this case, although the deed of the 4th of February, 1820, was unduly recorded long after the time limited by the Act of Assembly, yet the Chancellor is perfectly satisfied and convinced by the proofs in the cause, that Hudson & Co. had actual and express notice of its existence before the execution of the deed from J. and T. Vance to them; and, therefore, the claim of Hudson & Co. must be postponed, and give place to that of Warner and Vance. And Neale, Lucas and Donaldson, the trustees under the deed of the 20th of January, 1828, will be directed to apply the proceeds of the debts, and property which were so conveyed to them, in trust, after deducting all their necessary expenses, and a commission to be allowed them of seven *per centum* on the whole amount they have and may disburse—First, to the payment of the rent for which the property was distrained and liable—next to the satisfaction of the claims of

the plaintiffs under their deed of the 4th of February, 1820,—then to the satisfaction of Henry Hudson's claim, as surviving partner of the firm of Hudson and Co. under their deed of the 18th of May, 1822, and the residue, if any, according to the terms of the deed of the 20th of January, 1823. And for the purpose of having this adjustment made—Decreed, that the cause be referred to the auditor, with directions to state an account accordingly, from the proceedings and proofs, and such other proofs as the parties may produce in relation to any necessary expenses incurred in the execution of the trust under the deed of the 20th of January, 1823.

The auditor reported accordingly, stating the amount of the sales by the trustees to be \$3,036.05; and, after deducting the trustees' commission, their expenses, paid for house rent, and the costs of suit, amounting to \$1,250.23, he stated that there was due to W. Vance \$2,299.16, and his proportion of the balance was \$365.33, and to W. Warner \$8,939.67, and his proportion of the balance was \$1,420.49. This report was ratified and confirmed by the Chancellor on the 22d of October, 1825, and the trustees were decreed to pay to the *complainants, or bring into Court to be paid to them, the **424** sums of money respectively allowed to them in the said report of the auditor. From this decree Hudson appealed to this Court, and in his petition to the Chancellor for the appeal, he prayed that on giving bond and security for the costs and interest on the money to be brought into Court, that the amount to be brought in might be retained in Court until the final decision of the case in the Court of Appeals. The Chancellor granted the appeal; and ordered that all proceedings in the case, pending the appeal, be stayed on the defendant's filing within the time limited by law, a bond to the complainants, with the usual condition, in the penalty of \$6,072.10, with a security or securities to be approved by the Chancellor.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

Taney, (Attorney-General,) and *Mitchell*, for the appellant, cited *Act of Ass.* 1729, ch. 8; *Dorsey vs. Smithson*, 6 H. & J. 63; *Stat.* 13 Eliz. ch. 5; *Fitzhugh vs. Anderson*, 2 Hen. & Munf. 308, 303; *Sturtevant vs. Ballard*, 9 Johns. 337; *Esp. Evid.* 238; *Hamilton vs. Russell*, 1 Cranch, 316; *Weller vs. Wayland*, 17 Johns. 102; *Brinkerhoff vs. Marvin*, 5 Johns. Ch. 327; *Shirras vs. Caig*, 7 Cranch, 34; *Livingston vs. McInlay*, 16 Johns. 165; *Wordall vs. Smith*, 1 Campb. 332, 333; *Boyd vs. Dunlap*, 1 Johns. Ch. 184; 3 Bac. Ab. 313; 19 Ves. 434, 437.

Winchester, for the appellees, cited 1 Madd. Ch. 327, 328; *Anderson vs. Maltby*, 2 Ves. Jr. 254, 255; 2 Eden, 228; *Frost vs. Beekman*, 1 Johns. Ch. 302. What kind of notice is necessary to put a purchaser upon inquiry, &c.? *Sugd.* 498; *Smith vs. Low*, 1 Atk. 490; *Ward vs. Turner*, 2 Ves. 437, 440; *Underwood vs. Lord Courtown*, 2 Sch. & Lef. 66; 3 Bac. Ab. 313.

427 * ARCHER, J. delivered the opinion of the Court. The Chancellor has in this case decreed, that the funds in the hands of the general creditors of John and Thomas Vance, shall be appropriated in the first place to the discharge of the claim of William Warner and William Vance. Hudson, surviving partner of Hudson & Co., claims priority in the distribution of these funds in virtue of his bill of sale from Thomas Vance, of the firm of John and Thomas Vance, dated the 22d of May, 1822; and as his claim has been postponed, he has prayed an appeal to this Court.

The appellant relies on his legal title, which he contends overreaches any lien which Warner and Vance could have on the property.

The bill of sale made in 1820 to Warner and Vance was made upon a good consideration. It was made to indemnify them against suretyships entered into, and to be entered into by them for J. and T. Vance, and it cannot be questioned, but that it was perfectly available as between the immediate parties to the instrument, although it was not recorded. It might be void against creditors who were injured by it; yet, nevertheless, binding on them. The principle was settled by this Court in the case of *Dorsey vs. Smithson*, 6 H. & J. 63.

If it be binding on J. and T. Vance, the next subject of inquiry will be its effect upon the transfer made to Hudson, and whether it will overreach the claim of Hudson? And * this will depend
428 on the solution of several questions—whether the mortgage of J. and T. Vance to Warner and Vance covered the property claimed by Hudson? If it did, whether Hudson had notice of the lien of Warner and Vance? And lastly, the effects of such notice, if any such existed, upon the claim of Hudson.

The mortgage covered the stock of books and stationery in the store of J. and T. Vance at its date, and the fund, now for the disposition of the Court, arose from the sale of the books and stationery in the store in February, 1823, a period of three years after the date of the mortgage. The ability of the instrument to cover the proceeds of the sales of the stock mortgaged, which might remain in the hands of J. and T. Vance, or such additional stock as, with the proceeds of the sale, or by other means, might have been purchased by J. and T. Vance, and put in their store, to replace such sales as may have been made by them between the date of the mortgage and the date of the sale by the trustees of the general creditors, need not be examined or determined in this case. There is no evidence to show that there was an entire sale of the old stock, and that it was replaced by new, between the date of the mortgage and the sale by the trustees; or that any books or stationery were purchased in the intermediate time, and mingled with the old stock. There is evidence of sales, but no testimony to show that the original stock was exhausted or partially replaced; and in the absence of such testimony,

we cannot but intend, that the sales, which took place under the superintendence of the trustees, were of the remnant of the stock of goods mortgaged. It is certain that goods were received from Hudson by John and Thomas Vance, and were credited in their books; but whether they were brought to their store, and mingled in the general mass of their capital, is not in evidence.

The next subject for consideration will be, whether Hudson had notice of the pre-existing lien of Warner and Vance. Hudson must be supposed to be conversant of the facts stated in his own bill of sale, and the transfers therein made. Looking at this, we find a conveyance of all the books and stationery, and other property in the possession of Warner, in which J. and T. Vance had an interest. Hudson, in his answer, *endeavors to limit the generality of these expressions, and intimates, that they had reference **429** solely to the books of accounts and evidences of debt, of which Warner had taken possession. But if this were the object, and he had no reason to fear that Warner had taken possession of the books, stationery and other property, it would be difficult to divine a reason for the insertion of these general words in the instrument. When we examine the testimony in the cause, and look at the efforts of Warner to take and maintain possession of the store, these general words in the conveyance, strongly incline us to believe that Hudson could not have been unaware of the claim of Warner, and of the facts which actually occurred as springing out of that claim. But independent of the bill of sale, the answer distinctly admits the notice, before the execution of his bill of sale, that Warner and Vance had received a conveyance. It is true he was, at the same time, apprised that nothing was due upon the conveyance; but from whom? from his creditor, who was then pressed to give him a security for his debt. Ought he to have confided in such an interested representation from one whom, common sagacity might have admonished, would, very naturally, be inclined to rid himself of the pressing solicitations of importunate creditors, by the most favorable representations of the unincumbered and unshackled condition of his estate? He was not, in truth, so easily imposed upon. At least he was not willing to confide entirely in Vance's statement; for we find, that notwithstanding he had been informed by Vance that his bill of sale to Warner was never placed upon the records, he examines into this fact for himself, and when he ascertained satisfactorily that nothing was on record legally binding the property, he resolves to take the title, and hazard the experiment, whether his title could not be made to override any unrecorded transfer to Warner and Vance. That such information, thus imparted to him, sufficiently affected him with notice, cannot be doubted, particularly when that information was accompanied with no equivocal indications, that the first conveyance was meant to reach the identical property, of which he took the transfer. If Hudson could have supported by testimony

what he has set up in avoidance of this notice, his claim would have been presented *in a very different view before this Court.

430 Could he have established the fact that he had made the inquiry of Warner, into the nature of his claim and lien, and had been led by Warner to believe that his incumbrances were removed, equity would never interpose to invalidate his claim. But these facts were necessary to have been established, as they constituted the only effective part of his defence, and it is scarcely necessary to say, that his answer can furnish no evidence of these facts.

There is one part of this transaction which cannot escape the remark of the most superficial observer. And in adverting to it, we, by no means, intend to cast any censure on Mr. Hudson, as he was in the pursuit of a just claim, and of the means of securing it. The ceremonies attending the execution of this bill of sale were peculiar. To give it validity they were wholly useless. Why was adopted the symbolical delivery of the goods by the delivery of the key of the warehouse? One would have thought this was sufficient, yet to this was superadded, for greater security, the delivery of a book in the name of all the books, stationery and goods. If the transmission of the legal title was the object, these proceedings were useless, as his bill of sale effected that object. On the other hand, if the goods were to be transferred by delivery, then the bill of sale was unnecessary to be recorded, and all the stipulations upon which the delivery was to take place could have been effected by a writing, neither demanding record, nor acknowledgment. These ceremonies, and this *formula*, lead irresistibly to the conclusion, in connexion with the bill of sale, answer and evidence, that Hudson had such notice as would affect his conscience, and that there existed some pre-existing equity, which this machinery was to destroy, and which when prostrate, would permit his legal possession to rest in security.

As it appears conclusively to our minds that Hudson had notice, we are led to the examination of the effect of such notice upon his title. The Act of Assembly of 1729, ch. 8, had for its objects the suppression of secret sales. By demanding that transfers should be recorded, it was intended, that notice should be given, that no one might be injured or deluded by secret and unknown conveyances.

Its object then, being to protect creditors from prior secret

431 * conveyances, any such creditor, who had notice of such an incumbrance, could not be considered as falling in the class of those for whose benefit the Act was passed. For when he had notice, how could he be considered as injured by the conveyance? We cannot give the Act the narrow construction, which seems to be contended for, that no notice was sufficient to gratify the law, but such as was derived from the registry of the deed; for such a construction would invalidate transfers, which, it is obvious, from the general tenor of the Act, it was not the purpose of its framers to disturb, or interfere with. Any other kind of notice of the transfer, which demonstrates

the existence of a lien, or the transfer of a right, brought home to the party who seeks to avoid such lien or transfer, will be sufficient.

But although the bill of sale to Warner and Vance was made upon a good consideration, Hudson's bill of sale cannot be overreached by the previous bill of sale, unless it appear that an incumbrance, as against him, was created by it, which was not condemned as fraudulent by the peculiar circumstances which attended it.

The consideration of the unrecorded mortgage to Warner and Vance was two-fold—to guard them against injury from former securityship, and for anticipated loans and endorsements of notes. But, it is said, the recital which explains the object and purposes of the deed, is not conformable to the facts. If this be so, it would certainly subject the instrument to a very rigorous scrutiny, and a misrepresentation in this respect would subject it to strong suspicion. But it would not follow, that every variance in the statement of the real facts of the case, would defeat and destroy the instrument, where it appeared that the transaction was fair on the whole, and indemnity was the real object of the parties. Nor would the Court be disposed to hear with a very favorable ear, the objections of one who had received no injury from the transaction.

But in truth, there is no suggestion of falsehood, as we apprehend, in the recitals of the bill of sale. The responsibility of Warner and Vance had been undertaken for John and Thomas Vance, as was anticipated in the mortgage; and although there is no direct evidence that prior to the mortgage * notes had been loaned, yet they may have been so loaned; and constituting now no part 432 of their claim, we fairly presume from the course of business, that the earliest notes found in the record were, many of them at least, renewals of former ones loaned or endorsed by Warner and Vance.

In the retention of possession by John and Thomas Vance there will be found nothing to contaminate the transfer, for the possession was consistent with the deed; and although this would not necessarily render it valid, yet by the agreement of the parties it was not to have its completion immediately, but was prospective to a future event; that is, the default on the part of the mortgagors to pay the amount of the promissory notes whenever their payment should be demanded by Warner and Vance. And in such a special case it has been adjudged (*Bucknal vs. Roisten, Prec. in Ch. 287,*) that possession by the vendor till that future time, is entirely consistent with the deed. And if the deed is good at its commencement, it has been determined that it shall continue so, notwithstanding possession is retained at the time of the forfeiture. *Lady Lambert's Case, Shep. Touch. 65; Stone vs. Grubham, 2 Bulst. 25; Roberts on Fraud. Conveyances, 561, (note f.)*

Their failure then, to take possession of the property at the time of the forfeiture as stipulated in the mortgage, does not vitiate a deed which in its inception was valid and effectual.

It appears then, from our view of this case, that the mortgage from J. and T. Vance to Warner and Vance was binding between the parties thereto; that it was valid at common law, notwithstanding the retention of possession, its completion looking to a prospective event; that being valid in its commencement, it was not condemned by a failure on default to take possession of the property; that Hudson having notice of this conveyance, is bound by the prior lien which it created, and that he is not to be considered in the light of an injured creditor, having had such notice, and, therefore, not entitled within the meaning of the Act of 1729, ch. 8, to set up his title against the prior deed, and by so doing to treat it as a nullity.

Decree affirmed.

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* LAMMOTT *vs.* GIST.—June, 1828.

A parol agreement between a landlord and his tenant, that the latter should surrender the residue of his term in the premises leased, to a purchaser, in consideration of which, the landlord agreed to give up the rent in arrear, is void as being within the Statute of Frauds, and inadmissible in evidence on an issue joined in an action of replevin between such tenant and the bailiff of the landlord, in which the arrears of rent were claimed. (a)

APPEAL from Baltimore County Court. The appellee, (the plaintiff in the Court below,) brought an action of replevin against the

(a) Distinguished in *Lamar vs. McNamee*, 10 G. & J. 125. In that case there was an agreement by parol between a landlord and his tenant, that the latter should give up his unexpired term in a lease, and certain claims which he had for repairs, in consideration of which the landlord promised to pay the tenant a sum of money, and the tenant actually on the same day surrendered and the landlord took possession—*Held*, that an action by the tenant for the money was maintainable. The Court said that in the case in the text the parol agreement to surrender was executory, and had not been consummated by the delivery of possession when the distress was levied by the bailiff of the landlord. The tenant still remained in possession, and it was optional with him whether he would fulfil his contract to surrender or not. Everything rested upon the parol agreement, and that agreement being inoperative and void by the Statute of Frauds, as he was not bound by it, so neither was it obligatory upon his landlord: for where both parties are competent to contract, a mutuality of obligation is deemed to be essential to its obligatory force upon either. Cf. *Kinsey vs. Minnick*, 48 Md. 121. A surrender to a landlord is effected, either by words manifesting the intention of the lessee to yield up his estate, or by operation of law, where the parties, without such words, do some act which implies that they both agree to consider the surrender as made. *Beall vs. White*, 94 U. S. 382.

appellant, (the defendant in that Court,) to replevy a negro boy named Isaac, and sundry other personal property, which were replevied and delivered to the plaintiff. The defendant being summoned appeared, and by his avowry stated, 1. That, as the bailiff of Henry Shade, he acknowledged the taking the said goods, &c. because the plaintiff for one year, &c. held and enjoyed the premises as tenant to the said Shade, by virtue of a demise thereof, at and under the yearly rent of \$50, payable, &c. and because \$50 of the said rent, due and payable by the plaintiff to Shade for one year, &c. ending, &c. was in arrear, &c. the defendant, as the bailiff of Shade, well acknowledged the taking the said goods, &c. 2. There was a similar avowry by the defendant, as bailiff of Jehu Hughes. The plaintiff pleaded to the avowries, 1. That neither of the said sums of money, of the said rents, at, &c. was in arrear to the said Shade and Hughes, or to either of them, &c. Issue tendered and joined. 2. That before the issuing the original writ, to wit, on the 3d of October, 1823, it was agreed between the plaintiff and defendant, that the plaintiff should deliver up the possession or the farm upon which he resided, and relinquish the residue of his term; that the same should be received in full satisfaction of all rent then in arrear, or thereafter to become due. Which said farm was then and there delivered to the defendant, and he put in possession thereof, and the residue of the plaintiff's term therein relinquished in full satisfaction and discharge of the rent, &c. and which said possession and relinquishment, the defendant then and there accepted and received of and from the plaintiff, in full satisfaction, &c. Issue tendered and joined.

*1. The defendant at the trial, proved that the rent claimed was due on the 1st of March, 1823. The plaintiff then offered **434** to prove by parol, that in September, 1823, Shade, the landlord, agreed to sell and deliver possession of the property leased, to Jehu Hughes, and requested the plaintiff to give up the possession to Hughes, who agreed to deliver up the same in October, provided Shade would give up the rent in arrear, to which Shade assented. That the plaintiff remaining in possession of the said property on the 29th of September, the defendant, as bailiff of Shade, levied the distress for rent due on the 1st of March, 1823; and that afterwards, in the month of October, the plaintiff left the property demised, and delivered the possession thereof to Hughes. To which testimony the avowant objected; but the Court, [ARCHER, C. J. and HANSON, A. J.] overruled the objection, and allowed the same to go to the jury. The avowant excepted.

2. The avowant then prayed the Court to instruct the jury, that he was entitled to recover. Which instruction the Court refused to give. The avowant excepted. Verdict upon the first issue—"that the said sums of money of the rents aforesaid, at the same time, when, &c. were not, nor was either of them, in arrear and unpaid to

the said Shade and Hughes, or to either of them, nor was any part thereof," &c. Verdict on the second issue—"that before the impleading to the writ original, the plaintiff had delivered to the defendant, and the defendant had then and there accepted of and from the plaintiff, the said farm, and the residue of the plaintiff's term therein, in full satisfaction and discharge of the rent so in arrear, or to become due," &c. Damages assessed to one cent. Judgment entered for the plaintiff, that he hold the goods, &c. and also for the damages laid in the declaration, and costs; to be released on payment of one cent, and costs. From this judgment the defendant appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

Kennedy, for the appellant, cited *Bradley on Distresses*, 217; *Bird vs. Caritat*, 2 *Johns.* 342; 2 *Chitty's Plead.* 508, (note c;) 1 *Chitty's Plead.* 227; 6 *Com. Dig. tit. Pleader*, (C;) 2 *Stark. Evid.* 60; *Rawlinson vs. Shaw*, 3 *T. R.* 557; *Doe vs. Wandlass*, 7 *T. R.* 113; *Abitbol vs. Bristow*, 6 *Taunt.* 464, (1 *Serg. & Lowb.* 454;) 3 *Serg. & Rawle*, 564; *Phillips vs. Rose*, 8 *Johns.* 392; *Chipman vs. Martin*, 13 *Johns.* 240; *Drake vs. Mitchell*, 3 *East*, 251; 1 *Com. Dig. (New Ed.) tit. Accord*, 201.

Meredith, on the same side, cited 2 *Stark. Evid.* 589; *Botting vs. Martin*, 1 *Campb.* 317; *Thomson vs. Wilson*, 2 *Stark. Rep.* 379, (3 *Serg. & Lowb.* 391;) *Mollet vs. Brayne*, 2 *Camp.* 103.

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* No counsel argued for the appellee.

MARTIN, J. delivered the opinion of the Court. We think Baltimore County Court erred in receiving parol evidence for the purpose it was offered, as stated in the first bill of exceptions. Gist held the property leased, under Shade, and that tenancy could not be determined by a parol license to quit the premises. The agreement was, that the lease should be surrendered, and the rent discharged, and is embraced within the Statute of Frauds, which provides, that no lease or term of years, or any uncertain interest, of or in any messuages, lands, tenements or hereditaments, shall be surrendered, unless by deed, or note in writing, or by act or operation of law. The release of the rent, and the surrender of the property, form one agreement—they cannot be separated; and to make the agreement available, it ought to have been in writing. *Botting vs. Martin*, 1 *Campb.* 317; *Mollet vs. Brayne*, 2 *Campb.* 103; *Thomson vs. Wilson*, 3 *Serg. & Lowb.* 391.

In the second bill of exceptions, there was a prayer by the avowant, that the Court would instruct the jury, he was entitled to recover. If the parol evidence received by the Court, as stated in the first bill of exceptions, had been legal, this prayer might have been important, and then it would have been proper to consider the ob-

jections relied on in the argument, one of which was, a variance between the agreement offered in evidence, and that set out in the pleadings. But as this Court has decided, the parol evidence of the agreement, stated in the first bill of exceptions, ought not to have been received by the Court, that evidence must be rejected; and being rejected, the cause stood only on the pleadings and the evidence offered by the avowant. The pleadings do not controvert that Lammott was the bailiff of Shade, and it was proved by testimony the rent was due.

We dissent from the opinions expressed by Baltimore County Court, as stated in both bills of exceptions.

Judgment reversed, and procedendo awarded.

* THE STATE, use of GRIFFIN *et al.* *vs.* HANSON'S Adm'r. **437**
June, 1828.

R. as the executor of T. entered into a testamentary bond on his estate. Upon the death of R. letters of administration *de bonis non* were granted to B. In an action on the bond executed by R. brought against his administratrix, to recover the distributive shares due to certain legatees under the will of T. the replication, in assigning the breach, stated among other things, that B. had duly administered all the goods, &c. which came to his hands; but that R. did not duly and properly administer the goods of T. but misapplied and wasted the same. That by the inventory of the estate of T. returned to the Orphans' Court, among other, was the following property, to wit, one negro boy J. of the value of, &c. &c. which property was misapplied, wasted and consumed, by R. &c.—*Held*, that the action could not be sustained.

APPEAL from Charles County Court. This was an action of debt, brought on the testamentary bond executed to the State on the 29th of March, 1808, by Robert Hanson the intestate of the defendant below, (now appellee,) on the estate of Theophilus Hanson, as his executor. The defendant pleaded general performance, and the plaintiff replied non-performance, and assigned for breach, that Theophilus Hanson, the father of the said Robert, did in his life-time, to wit, on, &c. make, and in due form of law, sign, seal and execute, his last will and testament in writing, and thereby, after bequeathing certain specific legacies, &c. bequeathed as follows, viz. "*Item.* I leave and bequeath all the residue of my personal property, of what nature or kind soever, to my son Robert, and my daughter Mary H. Hanson, and their heirs, forever; in trust and confidence, nevertheless, and for the use and purposes hereafter mentioned, and no other use or purpose; that is to say, that my executors, hereafter mentioned, shall pay my just debts, and that Robert Hanson shall hold and enjoy absolutely one-third part of the said residue; that my said daughter, Mary H. Hanson, shall hold one other third during her

single life, and after her death or marriage, that which may be assigned for her use, shall be and remain to the children of Pamela L. Briscoe; and to direct and see that this provision is carried into effect, I hereby appoint Robert Hanson trustee for that purpose. And as to the other remaining third part of the residue aforesaid, it is my will

438 and desire that my son Robert * Hanson, and my daughter Mary H. Hanson, should have the legal right, and be trustees thereof; and as in the other bequest to Pamela L. Briscoe, they should make use thereof in the best manner they can for the separate use and support of the said Pamela L. Briscoe, and her children, for and during her natural life; and at the death of the said Pamela L. Briscoe, the said property, last devised, is to be equally divided between all the children she may leave." And he thereby constituted and appointed his son Robert Hanson, and his daughter Mary H. Hanson, executor and executrix, trustees and overseers, of his last will and testament. And that after making and executing his last will and testament, to wit, &c. the said Theophilus Hanson died, to wit, at the county aforesaid, by which said will and testament the said Robert Hanson was appointed executor thereof, and to whom letters testamentary were by the Orphans' Court of said county, in due form of law granted. In which said last will and testament, among others, is the following clause and bequest, to wit: "that Robert Hanson shall hold and enjoy," &c. [as set forth in said will.] The replication then averred, that after the execution of the said will, and death of the said Theophilus, the said Mary H. Hanson intermarried with a certain Samuel Griffin, which said Mary, as well as the said Robert and the said Pamela L. Briscoe, have since all died; by reason whereof, and by virtue of the last will and testament aforesaid, the children of the said Pamela became entitled to two-thirds of the residue of the personal estate of the said Theophilus, after all necessary allowance and disbursements upon the administration of the said estate were discharged and allowed. That upon the death of the said Robert, letters of administration *de bonis non* upon the estate of the said Theophilus, were granted to Thomas Burgess, who hath duly administered all the goods and chattels of the said deceased which came to his hands; but that the said Robert did not duly and properly administer the goods and chattels of said deceased, according to the tenor and effect of the said writing obligatory aforesaid, and to the condition thereof, but misapplied and wasted the same. That after the death of the said Robert Hanson, and

439 marriage and death of the said Mary H. Hanson, to wit, * &c. a certain Peter Griffin, in the endorsement of the original writ in this cause mentioned, was by the Orphans' Court of Charles County in due form of law appointed trustee to the children of the said Pamela L. Briscoe. That by the inventory of the estate of the said deceased, returned to the Orphans' Court, among other was the following property, to wit, one negro boy Joe, of the value of, &c.

&c. amounting in the whole to the sum of \$638.25, of which amount, to wit, the sum of \$422.75, the children of the said Pamela are entitled by virtue of the said last will and testament, and for which suit is brought by the trustee for their use as aforesaid. Which said property was misapplied, wasted and consumed, by the said Robert, in his life-time; of which said property the children of the said Pamela, by their guardian or trustee, or any other person for their use, never received any part or benefit therefrom, to wit, at, &c. The replication then avers, that the said Robert had not observed, performed, fulfilled and kept, the said several said matters and things in the condition of the said writing obligatory mentioned, but in this had wholly failed, &c. Rejoinder, that certain proceedings were had in the Orphans' Court in relation to the subject-matter in the present suit, and upon such proceedings the said Court then and there pronounced the following judgment, to wit: "Upon hearing the bill and demurrer in this case, the Court order and determine, that the bill be dismissed, with costs to the respondents, and that the administrator *de bonis non* is responsible for any and all claims in this Court against the estate of Theophilus Hanson," &c. To this rejoinder the plaintiff demurred; and the County Court overruled the demurrer, and rendered judgment for the defendant. The plaintiff appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DORSEY, JJ.

J. G. Chapman, for the appellant. The action in this case arises upon a testamentary bond, for a *devastavit* of the executor, and is brought against the executor's personal representative. Theophilus Hanson, after bequeathing certain specific legacies, gives one-third of the residuum of his property * to the children of Mrs. Briscoe, his daughter, and upon the marriage of his other daughter **440** Mary, he gives one other third part to Mrs. Briscoe's children, and appoints his son Robert Hanson the trustee and his executor. Robert Hanson obtained letters testamentary upon the estate of his father, and converted a large amount of the personal property to his own use, and does not account to the Orphans' Court for it. He died before the settlement of the estate, and letters of administration *de bonis non* were granted to Thomas Burgess, who duly administered all the property which Robert Hanson, the executor, did not waste. To the plaintiff's replication the defendant rejoined, and the plaintiff demurred, which the Court below overruled. Three points arise upon the demurrer. 1. Whether the action can be sustained against the administratrix of the executor, on the bond executed by the executor of Theophilus Hanson, for a breach of the condition of the bond? 2. Whether a decision in the Orphans' Court, relative to the estate of a deceased person, is conclusive, and precludes the party from his action in the County Court on the testamentary bond? 3. That

there is such a departure in the rejoinder from the plea, as to be fatal.

1. The first point is to be settled by its analogy to adjudged cases. In the cases referred to in *Wheatley vs. Lane*, 1 *Saund.* 219, (*note* 8,) a judgment against an executor is evidence of assets on a *devastavit*; and upon that fact being established, the debt becomes personal, and the executor's personal representative is liable in his character of administrator or executor. In the case now before the Court, the *devastavit* is admitted, and the question does not vary from the point decided in *Wheatley vs. Lane*, except that the action is upon the bond for breach of the condition. By the Stat. 30 Car. II, ch. 7, and 4 & 5 William & Mary, ch. 24, s. 12, the executor or administrator of any executor, who shall waste or convert to his own use, the estate of his testator, shall be liable and chargeable in the same manner the testator or intestate would have been if living. It seems to be evident, that if Robert Hanson, the executor, were living, he would be liable to the equitable plaintiffs in an action on his bond for the *devastavit*.

441 The case of *Shelton vs. Hawling*, 1 *Wils.* 258, seems to be * conclusive as to the liability of the administrator of the executor, for the *devastavit* committed by the executor. This was the principal point decided in the Court below; and if the principle is correct, the administrator *de bonis non* cannot be answerable; for upon the *devastavit* being established, the debt becomes personal as to the executor, and if living, he would be chargeable *de bonis propriis*; his administratrix must, therefore, be chargeable in her representative character. The action could not have been brought upon the administration bond entered into by the administratrix, for she might have administered all the goods of Robert Hanson, and yet the securities on his bond would not have been discharged; neither could the action be sustained against the administrator *de bonis non*, for he is not in default, having administered all the goods of the testator, Theophilus Hanson, which came to his possession, and complied with the condition of his bond. If Robert Hanson's estate was insolvent, and the securities in his bond in the like situation, will it be contended that the administrator *de bonis non*, would be answerable to the distributees for the executor's *devastavit*? If such doctrine was law, who would administer after a wasteful executor? He, then, who is in default, should be chargeable for the waste. The appellee represents the executor, Robert Hanson, and should be chargeable for his *devastavit*, as far as she has assets of his estate. *Merchant vs. Driver*, 1 *Saund.* 807; *Blackmor vs. Mercer*, 3 *Saund.* 403. It will not be denied that the administrator *de bonis non* could have maintained an action against the administratrix of the executor, (the appellee,) for the property which was not accounted for by the executor, Robert Hanson. *Haslett vs. Glenn*, 7 *H. & J.* 17. But it is contended on the part of the equitable plaintiffs, (the appellants,) that an action is given to them on Robert Hanson's bond, by the Acts of Assembly of 1718, ch. 5; 1798, ch. 101, sub-ch. 3, s. 10. In an action of

assumpsit between the legatee and the executor, the law will not imply a promise, except for a specific legacy; but here the action is for a breach of the condition of the bond, and is brought for the use of those interested, against the representative of him who failed to comply with the condition of his bond to * the State, and to “discharge the duties required of him by law in the faithful 442 performance of the office.” The State is the plaintiff, and the condition broken the cause of action. If the executor was living, can it be denied that he would be answerable in this form of action? He is represented by the appellee, who is chargeable with his contracts, and answerable for his broken covenants. If the legatees were driven to their action against the administrator *de bonis non*, and be compelled to institute suit against the administratrix of Robert Hanson, it would be such a multiplication of suits as seems to be guarded against by the Acts of 1718 and 1798, by giving to all persons interested, an action in the name of the State on the bond. Upon the breach of the condition of the bond, the executor becomes indebted to the State in the amount of the penalty, for the use of those interested. The State is trustee for the legatees, the debt accrues upon breach of the condition, the executor is chargeable *de bonis propriis*, and his administratrix is chargeable in her representative character for his debts. The State, as trustee for the legatees, is a creditor, and brings this action. The administratrix of the executor is bound to account for property disposed of by the executor, and not accounted for by him. Act of Ass. 1816, ch. 203, s. 3.

2. The proceedings in the Court below were commenced prior to those had in the Orphans’ Court, and of a different character. An application to the Orphans’ Court for an order to compel a settlement, does not preclude the party interested from his action on the bond. Act 1798, ch. 101, sub-ch. 16, s. 19. The County Court has jurisdiction in such cases. 1798, ch. 101, sub-ch. 14, s. 6. The defendant below, (the appellee,) by her rejoinder to the plaintiff’s replication, sets out, that certain proceedings were had in the Orphans’ Court, without stating the nature of those proceedings. The proceedings in that Court could not have been of the same nature, because the Act of 1798 does not give to that Court jurisdiction in an action on the testamentary bond. The administrator *de bonis non* may be answerable for all claims in the Orphans’ Court against the estate of Theophilus Hanson, (the testator,) and yet not answerable in the County Court for legacies which he never received. The appellee should have stated in her * rejoinder the application which was made to the Orphans’ Court, with the record of the pro- 443 ceedings.

3. The rejoinder is a departure from the plea—the plea answers the declaration, but the rejoinder neither answers the replication, nor is it a continuation of the defence commenced by the plea. The rejoinder does not support the plea. The plea alleges that Robert

Hanson did perform the condition of the bond, &c. The rejoinder states, that certain proceedings were had in another Court, and that that Court decided that another person was answerable for claims against the estate of Theophilus Hanson. This is not a claim against his estate, but against the estate of Robert Hanson. This is a departure, and does not answer the replication. 1 *Chit. Plead.* 619, 627; *Hays vs. Bryant*, 1 *H. Blk.* 253; *Roberts vs. Mariett*, 3 *Saund.* 188; *Richards vs. Hodges*, 2 *Saund.* 84; *Harding vs. Holmes*, 1 *Wils.* 122; *Chapman vs. Chapman*, *Cro. Car.* 76, 77; *L. Proprietary vs. Cockshut*, 1 *H. & McH.* 40.

No counsel argued for the appellee.

Judgment affirmed.

MACCUBBIN *et al.* vs. CROMWELL.—June, 1828.

A widow has a right to ask in equity part of a fund in lieu of dower, where that fund has been produced by the sale of her husband's lands, which were subject to her dower, and increased, by being sold clear of that incumbrance with her approbation, and consent; and where she has assigned such a claim, her assignee will succeed to her rights. (a)

An audit may be examined on appeal, although no exceptions were taken to it in Chancery; and if the Chancellor acted upon improper testimony, or mistook the principles of law, the audit will be reformed, or the decree reversed.

Where funds are in the Court of Chancery, and a party petitions to have them applied in discharge of his claim, it has long been the uniform practice of that Court in this State, to receive the papers, on which the claim is founded, as *prima facie* evidence, and the Chancellor acts on them accordingly, unless the testimony is put in issue, and full proof required by the opposite party. (b)

This practice is founded in convenience, to save expense to suitors in that Court, and ought not to be disregarded. It does not deprive the
444 party * of his right to have full proof, if he thinks proper to demand it. He may file exceptions to the report of the auditor; and, even if the report has been confirmed, upon petition the Chancellor would direct it to be opened, and strict legal proof would be required.

If exceptions are filed, the testimony is put in issue, and the Chancellor ought to require full proof; if he proceeds without strict legal evidence, it would be error.

The report of a trustee appointed by the Court of Chancery, made under oath, stating that he had sold a tract of land "free and clear of all right and title of dower of M. the widow of the deceased tenant in fee, she having conveyed, for a valuable consideration, all her interest in the premises to C." together with the deed of M. to C. for her dower, is sufficient *prima facie* evidence, to enable C. to sustain a claim, by petition, for at least a less sum than the value of M's dower, to be paid out of the proceeds of such land, which were in that Court for distribution.

(a) Cited in *Wilhelm vs. Wilhelm*, 4 *Md. Ch.* 334.

(b) Cited in *Jackson vs. West*, 22 *Md.* 82; *Brown vs. Thomas*, 46 *Md.* 641.

APPEAL from the Court of Chancery. This case is sufficiently stated by the appellant's counsel, and the Judge who delivered the opinion of this Court.

It was argued before BUCHANAN, C. J., EARLE, MARTIN, and ARCHER, JJ.

R. B. Magruder, for the Appellants, stated, that it appeared by the record, that on the second of July, 1810, a bill was filed in the Court of Chancery by Henry W. Dorsey against John Cromwell, (the now appellee,) David Whelan, and the children and heirs-at-law of Zachariah Maccubbin, deceased, (the present appellants,) to set aside a deed, charged to have been fraudulently executed on the 15th of November, 1809, by Maccubbin, to Whelan and Cromwell, for all his real and personal estate. The bill stated that Maccubbin, at the time of executing the said deed, was indebted to the complainant in a large sum of money—Prayer, that the deed might be decreed to be null and void, and the estate of Maccubbin might be sold, &c. The answers of Whelan and Cromwell admitted that the property, real and personal, conveyed to them by Maccubbin, was liable for the complainant's debt. The answers of others of the defendants, (by their guardian, being infants,) admitted the debt due to the complainant, and the deed from their father to Whelan and Cromwell, which they stated, was in trust for the use and benefit of the children of their said father. The answers of Whelan and wife, (one of the heirs,) admitted the facts stated in the bill, but say nothing as to Whelan's claim on * account of the widow's dower. On the 14th of July, 1812, the Chancellor by his decree vacated the deed, and ordered a sale of the property therein mentioned, not noticing the widow, or her dower. A trustee was appointed to make the sale. Sales were made and reported. On the 15th of December, 1815, Cromwell, (Whelan being dead,) filed his petition to the Chancellor, stating that on the 10th of June, 1810, he, together with the said Whelan, believing it best for the interest of the children of Maccubbin, executed and delivered to Margaret Maccubbin, the widow of the deceased, their joint bond, conditioned for the payment of \$400 per annum, in consideration of which she executed and delivered to them a release of her dower in all the real estate of which her husband died seized. This release is exhibited. The petition then stated that Margaret Maccubbin intermarried with Joseph L. Fletcher, and had since departed this life; and that Whelan was also dead. That the petitioner and Whelan had paid large sums of money on account of said bond, and that suits were then depending for the recovery of the balance due on the said bond—Prayer, that the auditor be directed to state an account between the estate of Maccubbin and the petitioner; and that the various sums paid by him and Whelan be repaid to them, &c. To this petition there was no affidavit, nor proof of facts, nor any prayer for a *subpœna* to the

trustee, or to the heirs. On the 20th of July, 1818, the trustee, appointed to make the sale, prayed by his petition to be discharged from his trust, stating that he had sold a part of the lands, &c. He was discharged, and another trustee was appointed for the sale of the property which remained unsold, &c. On the 3d of May, 1824, Cromwell by his petition stated, that in March, 1809, Zachariah Maccubbin, being seized in fee simple of a considerable tract of land, departed this life, leaving Margaret Maccubbin his widow. That the said Margaret, being desirous of procuring an assignment of her dower, applied to the heirs of the said Zachariah therefor. That the petitioner, with David Whelan, who had married one of the heirs of full age, and gave the bond exhibited to the said Margaret, for the purpose of securing to her the sum of \$400 per annum, payable quarterly during her life-time, a sum vastly inferior to
446 the amount to which by law she was * legally entitled by way of dower—the estate of the said Zachariah having subsequently sold for \$29,578. The legal interest of which is \$1,774.68.—The amount due to the said Margaret for her dower of the said estate, is \$591.56. That the petitioner proceeded to pay the sum secured by the said bond for several years, until the said Margaret was married to Joseph L. Fletcher, and for some years afterwards also continued to pay, when the said Fletcher assigned the said bond to Thomas Armstrong, who brought a suit thereon, and obtained judgment against the petitioner to the amount of \$1,500, with interest, &c. A short copy of which judgment is exhibited. That the said Margaret died on the 14th of December, 1814, so that she was entitled to, and the petitioner has paid and is responsible for, \$1,850, with interest, &c. That under the decree for the sale of the estate of Zachariah Maccubbin, a part thereof was sold by the former trustee, and the residue by the present trustee, which latter trustee holds in his hands funds sufficient to discharge the claim which the petitioner conceives he justly has against the said estate, for money paid by him in case of the said estate increasing its value, or diminishing the amount of incumbrances thereon. Prayer, that the present trustee be directed to pay the claim of the petitioner, with interest; or that dower be assigned to the said Margaret, and the petitioner substituted for her to receive the same when so assigned; and for other relief, &c. To this petition there was no affidavit, nor proof.

On the 7th of May, 1824, Chancellor JOHNSON in his order stated, “that the application was to allow to the petitioner the money the widow of Zachariah Maccubbin would have been authorized to receive in lieu of her dower in the lands sold under the decree, she (as is presumed,) having consented that the sale should be free of dower. The petitioner claims to be placed in her situation, in consequence of having purchased the right of dower from her. On examining the papers I find that on the 13th of May, 1819, a report was made by the auditor, which was acted on by the Chancellor the same day,

leaving a large balance in the hands of the trustee. On the 31st of December, 1821, the report of the last trustee was confirmed, and an order passed for the auditor to state an account, * appropriating the proceeds. I do not perceive that any thing has **447** been done under that order, or on the sales of the first trustee since the 13th of May, 1824."—Ordered, "That the auditor state accounts in regard to each trustee, in distributing the funds. In one account, he will allow to the petitioner the claim on account of dower; in the other, he will reject it." This order meant, of course, that the fact should be proved, that the widow had consented that the sale should be free of dower. The auditor on the 15th of July, 1824, made a report, in which he stated, that by an order of the 29th of December, 1813, he was directed to state an account with the original trustee for certain advances, he then reported, he had necessarily made to the heirs of the deceased. The materials for such an account were never furnished, and, therefore, the balance of the account reported on the 13th of May, 1819, was left unappropriated, and for the same reason continued so. That by another order of the 15th of December, 1815, passed on the petition of the petitioner, then filed, the auditor was directed to state the claim of the petitioner and David Whelan; but on examining the papers, no statement of, or voucher for, the payment said to have been made to the deceased widow, were to be found, nor was the time of the death of the widow, either shown or stated, and that order, of course, could not be executed. The present trustee's report represented, that the quantity of land sold by him, had not been satisfactorily ascertained; and no bill of his expenses accompanied it. The execution of the order of the 31st of December, 1821, was, therefore, postponed. Most of those difficulties still exist; nevertheless, in obedience to the order of the 7th of May, 1824, he has stated a continuation of the account with the first trustee, applying the unappropriated balance to the payment of the additional costs of this Court, and then dividing the residue equally among the heirs of the deceased. And with the present trustee he has prepared an account, in which the proceeds of his sale are applied to the payment of the costs of this Court, and the amount of the petitioner's claim, stated from the petition, as of the day of sale, and the balance divided as aforesaid. And also another account, in which the claim of the petitioner is excluded, and the whole amount of the sale, * deducting the costs, is so divided. On **448** the 27th of July, 1825, the former trustee reported, on oath, "that the property, when offered at public sale, as stated in his former report, was put up and sold free and clear of all right and title of dower of Margaret Maccubbin, the widow of Zachariah Maccubbin, deceased—she the said Margaret having conveyed, for a valuable consideration, all her interest in the premises to John Cromwell and David Whelan, who consented to the said sale as stated."

Chancellor BLAND, in his order of the 1st of August, 1825, stated "that it now appears by the additional report of the trustee, that the whole estate of the late Zachariah Maccubbin was sold free and clear of the widow's right of dower, and consequently that Cromwell and Whelan, who purchased the widow's right of dower, are entitled to have their claim satisfied out of the whole proceeds of the sale. But on considering the nature of their claim, it appears, by the petition of Cromwell, filed on the 15th of December, 1815, he and Whelan ask only 'that the various sums of money paid by them may be repaid, with interest.' And by the petition of Cromwell, filed on the 3d of May, 1824, their claim is again presented, substantially in the same way; that is, 'for money paid in ease of the said estate.' And according to an informal estimate, made and laid before the Chancellor by the auditor, it appears that the aggregate amount of the various sums which Cromwell and Whelan thus claim to have refunded and repaid to them, with interest, is much less than the amount to which they would be entitled as assignees of the widow, claiming the full amount, which she would have a right to demand in lieu of her dower. And since they have asked only for the lesser amount, or a mere reimbursement, as stated by the auditor, it is quite reasonable, as the case now stands, that it should be awarded to them; therefore, ordered, that the auditor's report and statement of the 15th of July, 1824, allowing the said claim of Cromwell and Whelan, be ratified and confirmed, and the trustee is directed to apply the proceeds accordingly," &c. From this order the heirs of Zachariah Maccubbin appealed to this Court.

449 * It is contended, on the part of the appellants, 1. That the Court of Chancery had no jurisdiction. 2. If the Court of Chancery had jurisdiction, so as to sustain the petition and claim of the appellee, there is no evidence in the cause to support the claim. 3. There is a want of parties, and the decree or order appealed from should not have passed, until other proper parties had been first made.

1. The first point.—The Court of Chancery had no jurisdiction. 1st. Even if this had been an original proceeding by the widow, and not a collateral one, the jurisdiction might be doubted. *Cooper's Plead.* 135, 136, (*notes r, s, t, u;*) *Curtis vs. Curtis*, 2 *Bro. Ch. Rep.* 630, 632. 2d. But as it is not original, but collateral, there is no power or jurisdiction in the Court of Chancery to permit even the widow, (if she asked it,) to come in upon this fund in this way, however creditors may do it. What is her situation at common law before assignment of dower? What is it after assignment? Could she apply before, or after assignment, for a sale of her interest, and to come in for the proceeds? If there was a mortgage of her interest, it might be different. Could an owner of a freehold, not mortgaged, or fettered by a trust, or by some other way, so as to give Chancery jurisdiction, go into Chancery against the remainder-man? There can be no

right to go upon a fund, upon the general equity law. If there be any, it must be by positive statute. What provision have the Acts of Assembly made to enable the widow to go into Chancery? The Act of 1786, ch. 45, s. 6, reserves her right of dower expressly. The Act of 1799, ch. 49, s. 6, allows dower to be sold, if the widow consent in writing. So also the Act of 1816, ch. 154, s. 10, 11, and 1819, ch. 183, s. 1, 2, if the widow will consent. These are the only instances in which a widow's interest may be disposed of, provided she consent. In all other cases, the law remains as it was, unaltered, and the Court of Chancery has no power over her right.

2. If the widow, or her assignee, could come into Court in this way, (as creditors do, on a bill filed by one for all,) there is no evidence to support any claim to dower. *Pannell & Smith vs. The Farmers Bank of Maryland*, 7 H. & * J. 202; *Giese vs. Thomas*, 450 *Ib.* 459, 460. It is insisted, 1st. That there is no proof that the pretended widow was ever married at all to the deceased. It is not mentioned in any of the petitions, nor was there any service of the petitions on any of the heirs, or any subpoena requiring their appearance. 2d. If married, she might have been an alien. 3d. There may have been a marriage settlement in bar of her dower. 4th. There is no proof that she ever executed the deed to Cromwell and Whelan; and if she did, there might have been proof, perhaps, that the bond was to be paid out of the personal estate conveyed by her husband to Whelan and Cromwell.

3. There is a want of necessary parties—material parties. *Cooper's Plead.* 21, 33, 34; 1 *Harr. Ch.* 77; *Fitzer vs. Fitzer*, 2 *Atk.* 514; *West vs. Randall*, 2 *Mason*, 190 to 196; *Cromwell vs. Owings*, 6 H. & J. 14; *Darne vs. Catlett*, *Ib.* 483. 1st. The widow (in her life-time) ought to have been a party. *Jackson vs. Aspell*, 20 *Johns.* 413; *Jackson vs. Vanderheyden*, 17 *Johns.* 168, 169; *Cathcart vs. Lewis*, 1 *Ves. Jr.* 463; 1 *Cruise Dig.* 159, s. 2; *Gilb. Ten.* 26. 2d. Fletcher (her husband) should have been a party. 3d. Armstrong, (the assignee,) should have been a party. *Coale vs. Mildred*, 3 H. & J. 278. Suppose a second mortgagee to file a bill, having bought out a first mortgagee, must not the first be made a party? Suppose an executor, before probate, to be made a party, yet never to take out letters, it is not sufficient without actual administration, because the account, if taken, might be “overhauled again after the grant of letters.” So in this case, Fletcher or Armstrong might come in. *Cooper's Plead.* 35. Why is the executor, as well as the heir of the mortgagee, made a party in a bill to redeem? “That the money shall return to the same fund out of which it came.” *Cooper's Plead.* 37.

Mayer and Meredith, for the appellee. 1. The Court of Chancery had no right to annul the deed from Maccubbin, to Whelan and Cromwell, except so far as related to the parties in the case who complained against the deed. It was a creditor's bill. *Rob. on Fraud.*

451 *Convey.* 643 to 651; 1 *Fonbl.* * 274, 278. The deed is binding on the party claiming under the grantor therein, *Jackson vs. Garnsey*, 16 *Johns.* 189; *Jones vs. Slubey*, 5 *H. & J.* 372; 2 *Com. Dig. tit. Chancery*, (3 *M.* 5,) 615; 4 *Com. Dig. tit. Fait*, (B. 4, B.) 278, (note.)

2d. This is not a claim for dower; but if it was, the Court of Chancery exercises jurisdiction in cases of dower. 7 *Johns. Ch. (General Index,) tit. Jurisdiction of Chancery*; *Rathbone vs. Warren*, 10 *Johns.* 587; *Titus vs. Neilson*, 5 *Johns. Ch.* 452; *Swaine vs. Perrine*, *Ib.* 482. *Everton vs. Tappen*, *Ib.* 497; 1 *Madd. Ch.* 196. But here the interest of the widow's dower comes incidentally into question. It must be admitted, that it is a proceeding *in rem*. *Tongue vs. Morton*, 6 *H. & J.* 21; *Smart vs. Wolf*, 3 *T. R.* 323; *The Monte Allegre*, 9 *Wheat.* 616; *Titus vs. Neilson*, 5 *Johns. Ch.* 452; *Herbert vs. Wren*, 7 *Cranch*, 376.

3. Where a party claims equity, he must do equity. 2 *Com. Dig. tit. Chancery*, (373) 594.

4. As to who ought to be made parties, they cited 2 *Madd. Ch.* 145; 8 *Com. Dig. tit. Chancery Pleading*; *Coale vs. Mildred*, 3 *H. & J.* 278; *Chambers vs. Goldwin*, 9 *Ves.* 269; *Blake vs. Jones*, 3 *Anstr.* 651.

5. There was no exception to the auditor's report in the Court below, and it is too late to except to it in this Court. 2 *Mudd. Ch.* 507; *Craven vs. Wright*, 2 *P. Wms.* 182; *Minus vs. Cox*, 5 *Johns. Ch.* 441; *Wilkes vs. Rogers*, 6 *Johns.* 566. The English practice, where applicable, has been adopted by our Courts. *Thompson vs. M'Kim*, 6 *H. & J.* 302.

Taney, (Attorney-General,) in reply, cited *Cooper's Plead.* 135, 136; 1 *Madd. Ch.* 196, 197; *Curtis vs. Curtis*, 2 *Bro. Ch.* 630, 632; *Ringgold vs. Ringgold*, 1 *H. & G.* 67; *Pannell vs. The Farmers Bank*, 7 *H. & J.* 202; *Giese vs. Thomas*, *Ib.* 460. On the question of proper parties, he referred to *Darne & Gassaway vs. Catlett*, 6 *H. & J.* 475; *Cooper's Plead.* 32, 33; *Jackson vs. Vanderheyden*, 17 *Johns.* 169; *Jackson vs. Aspell*, 20 *Johns.* 413; *Curtis vs. Curtis*, 2 *Bro. Ch.* 620, 629; *Cathcart vs. Lewis*, 1 *Ves.* 463; 2 *Madd. Ch.* 145.

455 * MARTIN, J. delivered the opinion of the Court. Zachariah Maccubbin on the 15th of November, 1809, executed a deed to David Whelan and John Cromwell, for all his real and personal estate. At that time he was indebted to Henry W. Dorsey in a large sum of money. After the death of Maccubbin, a bill was filed by Dorsey, to set aside this deed as fraudulent, and a decree was obtained vacating the deed, and directing the lands to be sold for the payment of Maccubbin's debts. The lands were sold under the decree, and the proceeds brought into the Court of Chancery, and a surplus remained after the debts were paid. The widow of Maccubbin was entitled to dower in the lands sold.

It is alleged by Cromwell that the widow, on the 14th of June, 1810, made an assignment of her dower to him and Whelan, in con-

sideration of a bond passed by them to her, to pay \$400 per annum during her life. That she afterwards intermarried with Joseph L. Fletcher, and died on the 14th of December, 1814. That several payments were made on the bond before the 13th of June, 1814, when it was assigned to Thomas Armstrong, who obtained a judgment at law upon it. That the lands were sold by the trustee clear of dower, Cromwell and Whelan having consented to it, and that the heirs of Maccubbin were benefited by the contract made with the widow, the sum to be paid her being considerably less than she would have been entitled to receive in lieu of her dower.

Cromwell claims to stand in the place of the widow in equity, and to be reimbursed the money he has actually paid, and that for which he is answerable under the judgment. It must be admitted, if he, as assignee of the widow, would be entitled to receive the whole sum that ought to be allotted to her, his equity is not lessened, by claiming only a part of it.

Three objections have been relied on in the argument to reverse this decree. The first is, that the Court of Chancery had no jurisdiction in the case. In examining this objection, it is proper to remark that the question is not, whether a Court of Chancery has jurisdiction to assign dower, where no impediment or obstacle appears to the recovery at law; but whether a widow has a right to ask, in a Court of equity, part * of a fund in lieu of her dower, where that fund has been produced by the sale of her husband's lands which were subject to her dower, and increased by being sold, clear of that incumbrance, with her approbation and consent? **456**

Why should she not have this relief upon general principles of equity, without invoking the aid of authorities, or the practice of Chancery to support it? She has relinquished her right of dower, in the lands of her husband, to which she was entitled by law, and being freed from that incumbrance, the proceeds of the sale have been greatly increased. The heirs were bound by her claim; and whether it is satisfied out of the lands, or the proceeds of those lands, seems to be a matter of no import to them. If the fund was increased by the relinquishment of dower, their portion was not diminished; and indeed, it cannot be overlooked, that one great object in selling lands in this way, is to produce a better price, and thereby benefit the estate. The case of *Herbert and others vs. Wier and others*, reported in 7 *Cranch*, 370, although not exactly similar to the one before us, bears, in many of its features, a strong resemblance to it. In that case there was a decree that the whole estate of Lewis Hipkins, deceased, should be sold, and the money brought into Court. The estate was sold under the decree, and a memorandum was made on the deed of conveyance, that it was subject to dower. The purchaser conveyed to the trustees of Fendall, for whom he bought the land, and those trustees sold and conveyed to Deane the defendant. In the deed to Deane there was a covenant to indemnify him against

the claim of dower. The widow of Hipkins, and her second husband Wier, applied to the Court of Chancery, praying that dower may be assigned to her in the lands of her first husband, or that a just equivalent in money may be decreed her in lieu thereof. Deane consented, if the Court would decree dower in the lands, he would give an equivalent in money in lieu thereof. There, as in this case, it was contended, a Court of Chancery had no jurisdiction, and could not grant relief. To which it was answered, the land being sold subject to the dower, and the deed to Deane having a covenant to indemnify him against dower, a Court of Chancery would call the parties before it, and decree money in lieu of land, when the purchaser
457 * and widow consented to it. That if the purchaser paid a sum of money in lieu of dower, it placed him in the same situation as if he had purchased clear of dower. The Court determined that the widow should receive, not a sum in gross in lieu of her dower, but that one-third of the purchase money should be set apart, and that she should receive the interest on it, during her life. This is a strong authority, so far as it relates to the jurisdiction of the Court. In *Tabell vs. Tabell and others*, 1 Johns. Ch. 45, William Tabell and wife entered into a mortgage of his property to Thomas Gardner, to secure the payment of a debt. The mortgaged premises were sold under a decree, the widow appearing and submitting, the debt was paid, and a surplus of the purchase money brought into Court. The Chancellor decreed, the widow was entitled to the use of one-third of the purchase money, after satisfying the mortgage debt, as her equitable dower, the same arising out of the real estate, in which she would have been entitled at law, subject to the mortgage. *Tilus vs. Neilson and others*, 5 Johns. Ch. 452. From an examination of the records in the Court of Chancery, it appears that Court has uniformly assumed jurisdiction in cases like the present, and it is thought, not a case is to be found where relief has been refused to the widow, when the land had been sold clear of dower, with her consent. A sum in gross is sometimes allowed; but whether that practice is in analogy to the Act of 1799, or upon general principles of equity, cannot affect this case. The real estate of Peter Cassenave was decreed to be sold for the payment of his debts. The trustee, without proper authority, sold the lands clear of dower. The widow, by a petition to the Chancellor, agreed to relinquish her right of dower, if the Chancellor would decree her a sum out of the purchase money in lieu thereof. This petition was granted, and a decree passed in 1801, allowing her a sum in gross. The Chancellor observes in his decree, this is the first case, in his recollection, where it was left to him to ascertain the proportion a widow is entitled to, on account of her right of dower, of the money arising from the sale of the whole interest in the lands of which her husband died seized in fee, having a legal title. Whether the widow is to be allowed a

sum in gross, or receive interest on * one-third of the purchase money, during her life, cannot affect the equity of this decree, 458 because the sum decreed to be paid, is less than she would be entitled to receive in either way.

The second objection is, if the Court of Chancery had jurisdiction, there is no evidence in the cause to support the claim.

If Cromwell is prevented by strict and rigid rules of law from obtaining relief in the manner directed by the decree, it must be admitted to be a cause of regret, for so far as this record speaks, it appears justice has been administered to all the parties concerned. The conduct of Cromwell and Whelan, proves they were actuated by the purest motives. Although the deed was made absolute to them, they have considered themselves only as trustees for the heirs of the grantor, and the contract made with the widow is certainly beneficial to those heirs. They require nothing for the trouble this trust must have caused them, but only to be reimbursed and saved harmless for money laid out for the advantage of the estate.

If we are to require in this case the same evidence that would be necessary in a Court of law, or upon an original bill in Chancery, the decree must be reversed, for there is scarcely a fact, on which the petitioner relies to sustain his claim, proved by legal evidence. If the assignment had been denied, its execution ought to have been proved by the witness to it, and a short copy of a judgment could not supersede the necessity of showing a full copy of the record. But is the same full proof required under the circumstances of this case? The funds were in the Court of Chancery, and Cromwell prayed to have a part of those funds applied to the discharge of his claim. It has long been the uniform practice in the Court of Chancery of this State, in applications of this kind, to receive the papers on which the claim is founded, as *prima facie* evidence, and the Chancellor will act on them accordingly, unless the testimony is put in issue, and full proof is required by the opposite party. This practice is founded in convenience, and to save expense to suitors in that Court, and ought not to be disregarded by us. Who is to be injured by it? It does not deprive the party of his right to have full proof, if he thinks proper to demand it. He may file exceptions to the report of the auditor, and even if the report * had been confirmed, upon petition, the Chancellor would direct it to be opened, and 459 strict legal proof would be required. The instrument of writing offered as evidence of the assignment, is acknowledged before two justices of the peace, and the second report of the trustee is verified on oath.

It has been contended this question is not now open for consideration; and although it might be proper to sanction this practice in Chancery, so fraught with advantage and convenience to suitors in that Court, if this was the first time it had been presented to us, that it is now too late, for it has been settled, by decisions of this Court,

that upon an appeal, the whole audit may be examined, and if the Chancellor has acted upon insufficient testimony, the decree must be reversed. It is not perceived that these decisions can affect the case now before us. Admit, that upon an appeal the whole audit may be examined, it surely will not be said the decree must be reversed, unless there has been error in the proceedings. If the Chancellor is justified by long usage and practice in his Court, to act on evidence *prima facie*, which is there considered as not to require full proof, unless it is demanded by the parties interested, it is difficult to be imagined, how it can be imputed to him as error. If it is not error in Chancery it cannot be error in this Court, and if it was correct there, it must be sanctioned by this Court. No decision, we think, can be found, to impugn this doctrine. It has been determined, as before observed, that an audit may be examined in this Court, although no exceptions were filed in Chancery to it; and if the Chancellor has acted upon improper testimony, or mistaken the principles of law, the audit would be reformed, or the decree be reversed. But that still leaves open the question, what is proper testimony? According to the rule in Chancery, the testimony afforded by this record is proper and deemed sufficient, unless it is objected to. If exceptions are filed, the testimony is put in issue, and the Chancellor ought to require full proof. If he then proceeds without strict legal evidence, it would be error, and could be taken advantage of in this Court. Such was the decision in the case of *Pannell & Smith vs. The Farmers Bank of Maryland*. All the facts, on which that case rested, do not appear either in the record, or the case as reported in *Harris & *Johnson*. The bill was filed by the

460 *Farmers Bank of Maryland, Robert H. Goldsborough and Alexander C. Magruder*, against *Mrs. Hanson, as administratrix of Alexander Hanson*. Goldsborough and Magruder, as the mortgagees of an unrecorded mortgage, claimed a preference over the other creditors in the funds arising from the mortgaged premises. When the funds were about to be distributed, this preference was resisted by the other creditors of Hanson, and Pannell and Smith exhibited, as the evidence of their debts, promissory notes, with affidavits, that no part had been received. The Chancellor directed two audits to be made; the one applying all the proceeds to the complainants' debt; the other applying them equally among the creditors. To the second audit, the complainants filed several exceptions, one of which was, that the debts were not proved by legal evidence. This exception put the testimony in issue, and having done so, the Chancellor ought to have required strict legal proof before he allowed any part of those claims. The exception, however, so far as it related to the sufficiency of proof, was disregarded, and this Court was certainly correct in deciding, under the circumstances of the case, there was no legal evidence of the appellants' debts. Not because the Chancellor might not have allowed them upon the evidence of the notes

with the probates on them, if there had been no objection to that testimony; but because the testimony was put in issue, by excepting to it, and that made it necessary to prove the execution of the notes.

It has been said, if the widow was entitled to a sum of money in lieu of her dower, it ought to have been paid out of the money arising from the first sale of the lands, because those lands alone were sold clear of dower. The sum allowed Cromwell by the decree is \$1,850, without interest. The proceeds of the first sale are \$24,763. To set apart one-third of that sum, the widow to receive the interest on it during her life, would be considerably more than the sum allowed to Cromwell. After paying the debts of Maccubbin, there remained a balance from the first sale of \$16,219.42, which was ordered to be paid over to the heirs. If then the heirs received the money, that ought to have been paid to the * widow, upon every principle of equity she would be entitled to have her **461** portion out of the funds afterwards brought into Chancery from the sale of the residue of the lands.

We think the third objection relied on—the want of proper parties—cannot avail the appellants; and the decree is affirmed, with costs.

Decree affirmed.

MIDDLETON *vs.* DYER.—June, 1828.

A testator, the owner of a large tract of land, devised a part thereof as follows: “beginning at my first bounded tree, running down Zachia Swamp to a branch called Jordan’s Branch, and so up the branch to B’s line; and if he (the devisee) has not 300 acres of land on that side of the branch, then he may run over the branch to make it 300”—*Held*, that in the location of this devise, the point of intersection of Jordan’s Branch, intended by the testator, was the mouth thereof; and that it ought to be located from the beginning tree, by a course running down the general direction of Zachia Swamp, to the mouth of Jordan’s Branch.

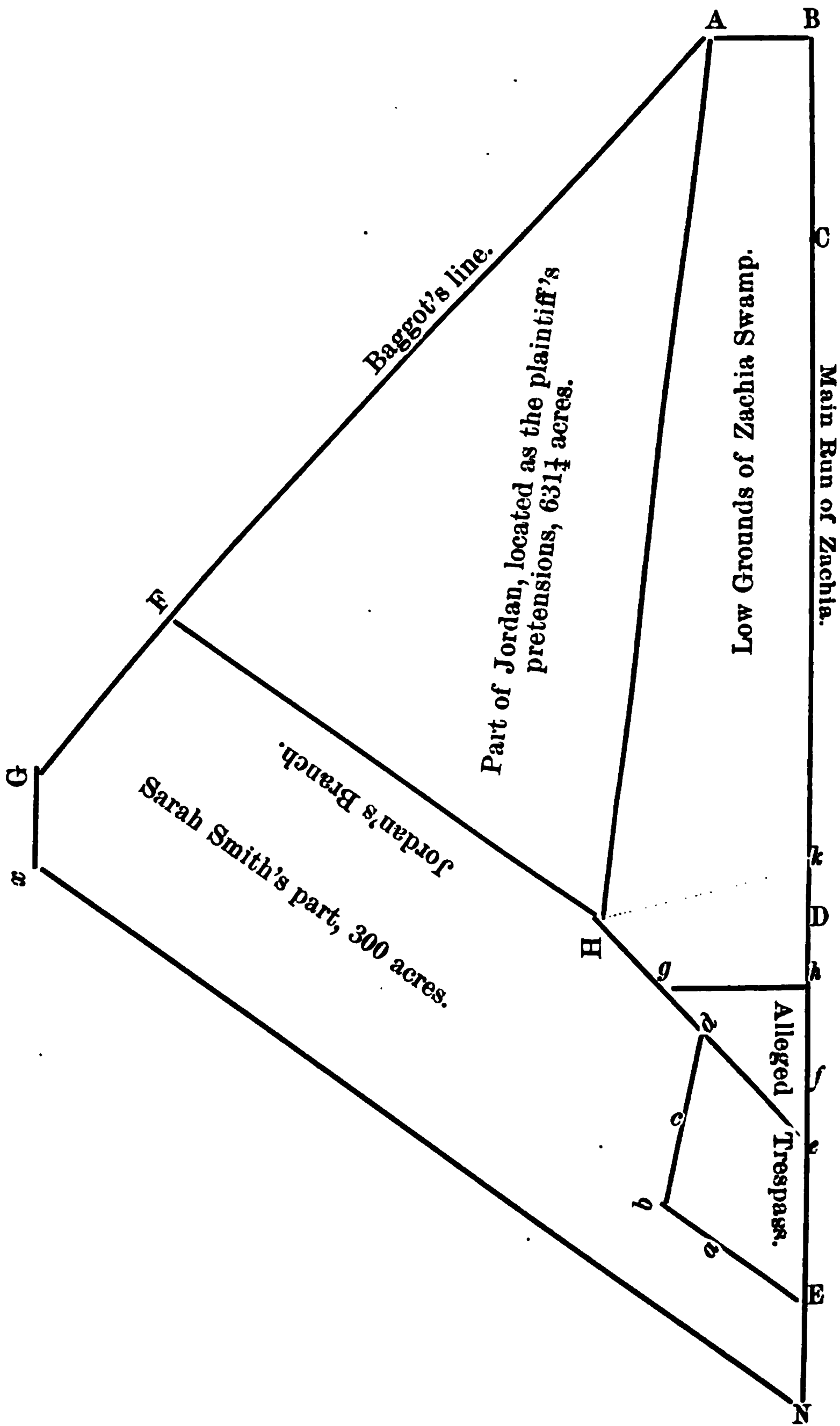
APPEAL from Charles County Court. Action of trespass for breaking and entering the close of the plaintiff, (now appellee,) called Jordan. The defendant, (the appellant,) pleaded not guilty, and *liberum tenementum*. Issue was joined to the first plea, and general replication and issue to the second plea.

At the trial, the plaintiff offered in evidence the plots and explanations returned under a warrant of resurvey issued for that purpose. He then offered in evidence a patent of the tract of land called Jordan, granted to William Joseph on the 15th of November, 1695, for 1,500 acres; and also a deed for that tract of land, from Joseph to John Smith, bearing date the 11th of November, 1696, whereby Joseph, in consideration of the sum of £176 sterling money, conveyed to Smith, his heirs and assigns, “all that tract or parcel of land called Jordan, lying in Charles County, in his Lordship’s Manor

of Zachia, and bounded as followeth, viz. Beginning at a bounded Spanish oak * standing on a point at the mouth of a small
462 branch falling into the main branch of Zachia Swamp, about half a mile above the coach road where it crosseth the said main branch on the south side of said main branch, bounded on the east with the said main branch, and running down with the said main branch these following courses, viz. S," &c. [six courses,] "to a bounded white oak standing at the mouth of a small branch falling into the said main branch of Zachia Swamp, then with a line drawn W. S. W. 510 perches, thence N. 19° easterly, 846 perches, straight to the first bounded tree, containing and laid out for 1,500 acres of land, more or less." That Smith entered into the said tract of land, and was seized thereof; and being so seized made his last will, which the plaintiff offered in evidence, dated the 13th of April, 1716, whereby, amongst other things, he devised as follows: "I give and bequeath to my son John Smith, this plantation whereon I now live, with three hundred acres of land, and no more, to him and his heirs and assigns, forever." "I give and bequeath to my daughter Priscilla Moore, the wife of John Moore, two hundred acres of land, to her and her heirs and assigns, forever; the two hundred acres I now give to the said Priscilla Moore to bound with the two hundred acres I gave to the said John Moore by a deed of gift, running from Zachia Swamp to the westward to the uppermost line." "I give and bequeath to my daughter Elizabeth Smith, three hundred acres of land, bounding upon John Moore's line, running from Zachia Swamp westward to the uppermost or the outside line of the manor, to her and her heirs and assigns forever." "I give and bequeath to my daughter Sarah Smith three hundred acres of land, to her and her heirs and assigns, forever; the land lying on the south side of Jordan's Branch, running from Zachia up with the branch clear to the Jordan's uppermost line of the manor." "I give and bequeath to my wife Ann Smith, the plantation whereon I now live, during her life; and at her decease, the plantation to the above named John Smith, his heirs and assigns." "I do hereby express my will and meaning to be this, that the said John Smith shall hold three hundred acres of land, as aforesaid, upon this plantation whereon I now live, beginning at my first bounded tree, running down Zachia
463 Swamp to a * branch called Jordan's Branch, and so up the branch to Samuel Baggott's line; and if he has not three hundred acres of land on that side of the branch, that he may run over the branch to make it three hundred; and that the said John Moore shall hold — hundred acres of land, to make up four hundred acres in all, running with George Ascomb's line to the uppermost line of the manor; and that the said John Moore, Elizabeth Smith and Sarah Smith, shall have their equally bredth of land upon Zachia Swamp, between George Ascomb's and the mouth of Jordan's Branch. I mean to have their bredth according to their

complement of land between George Ascomb's plantation and the mouth of Jordan's Branch." The plaintiff also offered in evidence the will of John Smith, the devisee in the will of the first mentioned John Smith, (who had entered upon, and was seized of the land devised to him,) dated the 4th of June, 1776, by which he made the following devises: "I give and bequeath unto my grandson Basil Smith, the land and plantation he now lives on, beginning at the first bound tree of the land called Jordan running down Zachia Swamp to a spring at the mouth of a lane, then with a straight line by a marked white oak to a small branch, then up the said branch to a back line, and after my wife's decease, all the land between the said lane and the pasture branch, to him and his heirs forever." "I leave and bequeath unto Margaret Smith, my daughter-in-law, the land and plantation she now lives on; the said land to begin at the fork of a branch, called The Pasture Branch, running up the branch to the back line till it intersects Basil Smith's line, and with Basil's line to the beginning; and after her decease to my grandson James Smith, to him and his heirs forever." "I leave and bequeath unto my loving wife Susanna Smith, my dwelling-house and plantation, with all the land I am possessed of or entitled to, during her natural life; and after her decease to be equally divided between my two daughters Susanna Dyer and Lucy Ordre Dyer, to be divided by their own direction, to them and their heirs forever." The plaintiff also offered in evidence a deed to him from Giles G. Dyer and Susanna his wife, bearing date the 8th of May, 1811, conveying * to him, the plaintiff, all that parcel of land devised by John Smith, last mentioned, to his two daughters Susanna and Lucy Ordre Dyer. The defendant then proved his title and possession of the 300 acres of land devised to Sarah Smith by John Smith, the elder; and also gave evidence that John Smith, the elder, died upwards of 100 years ago, leaving John Smith his only son, and Priscilla, Elizabeth and Sarah, his daughters. The plaintiff then prayed the Court to instruct the jury, that the correct location of the tract of land devised by John Smith to his son John Smith, was from A, the beginning, as described on the plots, to B; from B, down Zachia Run, to the mouth of Jordan Run, wherever the jury should believe it to be from the evidence, then up that run to F, then to the beginning. Which instruction the Court, [STEPHEN, C. J., KEY and PLATER, A. J.] gave to the jury. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court. 464

A PLAT OF THE LAND.



* EXPLANATIONS OF THE PLAT.

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The plaintiff located part of a tract of land called Jordan, which was devised by John Smith to his son John, by his will bearing date the 13th of April, 1716, as follows: Beginning at A, and running thence to B, at the main run of Zachia Swamp, then down and binding with the meanders of said main run to C, to D, and to E, at the mouth of Jordan Run, then up and with the old bed of Jordan Run, to *a*, to *b*, to *c*, to *d*, to F, in the line from G to A, then with said line to A, the beginning, containing 631½ acres.

The plaintiff located a piece of land on which he alleged the defendant had committed a trespass, &c. beginning at E, and running thence to *a*, to *b*, to *c*, to *d*, to *g*, to *h*, to *f*, to *e*, and then to E, the beginning.

The defendant located part of the tract of land called Jordan, devised by John Smith to Sarah Smith as his freehold, and for which he takes defence. Beginning at N on Zachia Run, and running thence up and with said run to *k*, then the dotted line to H on Jordan Run, then up and with Jordan Branch to the line from G to A, noted as Baggot's line, then with said line to G, then with the line of Jordan to *x*, then to N, the beginning.

The defendant counterlocated part of the tract of land called Jordan which was devised by John Smith to his son John, beginning at A and running thence with edge of low grounds of Zachia Swamp to *n*, to, &c. then to H at Jordan Run, then up and with the said run to Baggot's line, then with said line to A the beginning. [This location is represented on the preceding plat by the line from A to H.]

The cause was argued at June Term, 1827, before BUCHANAN, C. J., EARLE, and MARTIN, JJ.

Stonestreet, for the appellant, contended, that the Court below directed the jury to receive, as the correct location of the tract of land in dispute, that location which had been placed on the plots by the plaintiff below, whereas the true location of the land was a matter of fact, and belonged exclusively to the jury. *Howard vs. Cromwell*, 1 H. & J. 118. There is no dispute (he said,) * about the title to the land, as both parties claim under the will of John Smith, the elder; but that the question arose under the devise to Sarah Smith. In the devises to John and Sarah Smith, and in the grant of the land, there is a manifest distinction between the expressions used of Swamp and Branch. If the Court below had a right to direct the jury, yet they gave a wrong construction to the devise. The defendant below did not counterlocate the whole tract; but he counterlocated the plaintiff's location of John Smith's part under the devise to him. The adoption of one of these locations, was a matter of fact for the jury. Where there are conflicting locations, the jury are to decide from the evidence.

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C. Dorsey, for the appellee, referred to *Jarrett's Lessee vs. West*, 1 H. & J. 501. He said that all locations made, which are not counterlocated, are admitted. Here the original tract is located by the plaintiff, which the defendant has not counterlocated. The construction which the Court below gave to the devise to John Smith, he contended, was correct. *Curia adv. rult.*

BUCHANAN, C. J. at this term, delivered the opinion of the Court. This case is not without difficulty, and rests upon the intention of John Smith, to be collected from his will; in which the land devised to his son John Smith, is described as beginning at the first bounded tree of the devisor's land, and running thence "down Zachia Swamp to a branch called Jordan's Branch, and so up the branch," &c. The land so devised, is part of an original tract then owned by the devisor, called Jordan. The opinion of the Court below seems to have gone on the ground, that by "Zachia Swamp" was meant "Zachia Branch," treating them as synonymous terms; and that as the tract of land called Jordan, is expressed in the patent to run down and with, and to be bounded by the branch, the part devised to John Smith, should receive a corresponding location from the beginning tree of Jordan, to the mouth of Jordan's Branch. To accomplish which, departing from the expressions in the will, "running down Zachia Swamp," the Court assumed a course, from the beginning tree, across * the swamp to the branch, which

468 appears to us to have been wrong.

Apart from the ordinary acceptation of the terms, the grant of Jordan takes a clear distinction between the swamp generally, and the particular object called for in designating it as "the main Branch of Zachia Swamp;" and though it may be necessary, in the location of Jordan, to shape a course from the beginning tree, across the swamp, to the main branch for which it calls, in order to gratify the binding expressions of the grant, "bounded on the east with the said main branch, and running down and with the said main branch," &c. Yet the will of John Smith has no such expressions or binding calls, but merely directs that the part of Jordan, devised to his son John Smith, shall begin at the beginning tree of the original tract, and run down Zachia Swamp to Jordan's Branch. And in locating the devise, we can perceive no authority in the will for running from the beginning tree, directly across the Swamp, to the main branch, and then down the branch to the mouth of Jordan's Branch, according to the instruction of the Court, to which this exception was taken, instead of running down Zachia Swamp to Jordan's Branch, as directed by the will. There being no particular point on Jordan's Branch called for, the principal difficulty has been in determining what point of intersection was intended by the devisor; but taking the different parts of the will together, we think it sufficiently apparent that he meant the mouth of that stream.

The devise to his daughter, Sarah Smith, is of three hundred acres of land, "lying on the south side of Jordan's Branch, and running from Zachia up with the branch" to the outline of Jordan; thus constituting Jordan's Branch, from its mouth, the northern boundary of that devise throughout its whole extent on that side. The land devised to John Smith, is made to bind upon the opposite side of the same stream upwards from the point of intersection, by the provision authorizing him, if he should not have three hundred acres on that side, to run over the branch, so as to make up the quantity of three hundred acres. From which it would seem to have been the intention of the devisor, if John * should have his quantity of three hundred acres without running over Jordan's Branch, that that stream should be the boundary, not only of Sarah's land from the mouth upwards, but co-extensively the boundary between the lands of Sarah and John. We, therefore, think that the devise to John Smith ought to be located from the beginning tree, by a course running down the general direction of Zachia Swamp to the mouth of Jordan's Branch, wherever that may be found to be.

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Judgment reversed, and procedendo awarded.

FRAZER *et al.* vs. PALMER.—June, 1828.

Tenants, holding land adversely to petitioners claiming a sale of it as the devisees of one who had formerly been seized, cannot be ejected by the Court of Chancery, for refusing to obey an order of that Court, enjoining such tenants to deliver up possession to a purchaser under a decree for a sale, to which they were not parties. (a)

APPEAL from the Court of Chancery. A petition was filed in this case on the 10th of June, 1825, by John Palmer, (now appellee,) George L. Frazer and Charles D. Robinson, for the sale of part of a tract of land called Foxe's Hole, being part of the real estate of George Lanham, deceased. The petition stated, that Lanham, by his will dated the 3d of January, 1793, directed that his executors should rent the said land until the said Charles D. Robinson should attain the age of 21 years, then the said land should be sold by his executors, and that the proceeds should be divided between the said Robinson and the said George L. Frazer. That Robinson, having attained the age of 21 years, he and the said Frazer conveyed their interests in the said land to the said Palmer, viz. the former on the 7th of August, 1821, and the latter on the 16th of February, 1822. That the executors named in the said will, never executed the same so far as it related to the sale of the said land, and that they were

(a) Relied on in *Oliver vs. Cuton*, 2 Md. Ch. 301. Cf. *Griffith vs. Hammond*, 45 Md. 85; *Tongue vs. Morton*, 6 H. & J. 22.

dead. Prayer, that a trustee be appointed to make sale of the said land, and for further relief, &c. On this petition, the Chancellor, on the 10th of June, 1825, passed an order for the sale of the said land, and appointed George H. Lanham the trustee to sell the same, who on the 12th of November, 1825, reported that he had sold the

470 land to *the said Palmer, by whom the terms of sale were complied with. On the 14th of November, 1825, Palmer, (the purchaser and appellee,) petitioned the Chancellor to confirm the said sale, without publication, upon the ground that he alone was interested therein; and stating that Mary and John L. Frazer, (the now appellants,) were in possession of the land, refusing to give the same up to the petitioner, and praying that an order might pass requiring them to do so, or show cause to the contrary. The Chancellor accordingly passed an order ratifying the sale, and requiring M. and J. L. Frazer to deliver the possession to Palmer, or show good cause to the contrary on the 8th of December then next, provided a copy of the order and petition be served on them on or before the 23d of November. A copy was served in time; and on the 7th of December, 1825, M. and J. L. Frazer showed cause by their petition, setting forth, that after the death of George Lanham, the testator, his executors, John Frazer and Elie Lanham, sold the tract of land called Foxe's Hole, under the will, and that John Frazer, one of the executors, became the purchaser at an adequate price. That after Charles D. Robinson and George L. Frazer, the devisees, attained the age of 21 years, Robinson and John Frazer, the purchaser, agreed to refer it to arbitrators to say how much he, Robinson, should receive for his interest in said land; and that George L. Frazer, the other devisee, agree to take the same for his. The arbitrators on the 19th of October, 1805, awarded, that John Frazer, the purchaser, should pay to Robinson for his moiety, the sum of £113 12 1, which sum had been paid to him, as had also the same sum been paid to George L. Frazer, as appeared by copies of their receipts and the award filed in the Orphans' Court. That John Frazer, the purchaser, by his will dated the 29th of November, 1820, devised the said land to the petitioner, Mary, for life, and to the petitioner, John L. in fee after her death. That the testator was in possession of the land at the time of his death, which occurred in December, 1820, and had been in possession from the year 1805, and before, and that the petitioners had since continued in possession. That they were not parties to the proceeding under which the land was sold; that Palmer knew of their claim; and that before filing his petition,

471 *for a sale, he brought an act of ejectment against the petitioners, which he *nonpross'd*. The Chancellor, [BLAND,] on the 12th of December, 1825, decided the cause shown to be insufficient, and ordered an injunction to issue, commanding the petitioners to deliver possession of the land to Palmer. From this order the petitioners appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DORSEY, JJ.

J. Johnson, for the appellants, contended, that the order of the Chancellor was erroneous—1. Because the appellants were not parties to the proceedings under which the sale of the land to the appellee was made. 2. Because the appellants were in possession of the premises at the time the petition of the appellee was filed for a sale, claiming title to the same, under the will of a party who died seized.

A trustee may purchase of *cestui que trust*, if no fraud or advantage is taken, &c. *Coles vs. Trecothick*, 9 Ves. 246; *Morse vs. Royal*, 12 Ves. 373. The appellants having been in possession of the land for more than 20 years before the petition for a sale of it was filed, they ought to have been made parties. *Tongue vs. Morton*, 6 H. & J. 21; *Dunne vs. Farrell*, 1 Ball & Beatty, 124.

Magruder, for the appellee.

* EARLE, J. delivered the opinion of the Court. The argument of the appellants' counsel assumed in this case, as true, 472 the facts set forth in their petition to the Chancellor, and if they are so to be considered, as for this occasion it seems to us they must be, they make a case entirely within the principles of a former adjudication of this Court.

George Lanham devised the whole of the balance of his estate, real and personal, after a bequest of some small legacies, to Charles D. Robinson and George L. Frazer, with a power to his executors to sell his land, after Charles D. Robinson arrived at age, and to divide the proceeds between him and George L. Frazer. Charles D. Robinson arrived at age some time before the 19th of October, 1805, for at that time he bargained with John Frazer, one of the executors of George Lanham, for the sale of his legacy in the real and personal estate, thus devised to him by George Lanham's will. Soon after, George L. Frazer also sold his legacy under the same will, to John Frazer. From the time of the purchase of those rights, until his death, in 1820, John Frazer remained in the uninterrupted possession of George Lanham's real estate, using and considering it as his own; and just before his decease, he made his will, and devised it to the appellants. In 1821, soon after John Frazer's death, John Palmer, the appellee, obtained separate conveyances from Charles D. Robinson and George L. Frazer, for all their right and title in and to the real estate, which was devised by George Lanham to them. After this he instituted an action * of ejectment for this estate, 473 against the appellant, Mary Frazer, who holding adversely, resisted the suit, until it was discontinued by the plaintiff. John Palmer then united with Charles D. Robinson and George L. Frazer in a petition to the Chancellor for the appointment of a trustee to sell the real estate of George Lanham, pursuant to his will. The decree

passed, and the trustee appointed sold the estate to John Palmer, who obtained the Chancellor's order on the appellants, to deliver the possession to him. This is the order appealed from.

With these facts before us, we must entertain the opinion, that the Chancellor, in issuing his order, overlooked the authority of *Tongue vs. Morton*. The appellants were not parties to the decree for the sale of George Lanham's real estate, of which they had been possessed for many years before, holding it under Charles D. Robinson and George L. Frazier, and adversely to their grant to John Palmer, as was well known to him. And, to use the language of the above mentioned authority, "the appellants could not be removed from such a possession, until their title was adjudged to be defective in the regular and established course of judicial proceeding. Such an interest could not, consistently with the principles of our jurisprudence, be the subject of inquiry, and decided on, in a summary manner, by way of motion." The undeniable general power of the Chancellor to enforce his decrees, which operate upon real estates, by ordering the possession of them to be delivered to the purchaser, appears then to us to have been improvidently exercised by him in this instance, and his order is, therefore, reversed.

Order reversed.

HOYE vs. PENN.—June, 1828.

Where a creditor has a right to resort to the joint and several funds of two debtors for the payment of his claim, the Court of Chancery has no authority to limit that right, and to decree, that if the funds of one of the debtors shall not be sufficient to discharge one-half the debt, the creditor shall not look to the other debtor for the deficiency.

APPEAL from the Court of Chancery. On the 24th of March, 1812, certain real estate, conveyed to Charles Penn and * Nathan
474 Waters, was by the Court of Chancery decreed to be sold, or so much thereof as would raise the sum of £934 10 9½, with interest from the 1st of May, 1802, till paid, and the costs of the suit, and the amount of the trustee's commission as far as the same could be estimated; and in determining on the quantity of each part to be first sold, the trustee should sell the land held by the heirs of Penn, in the first instance, to raise one-half of the debt, costs and commission, and should sell the land devised to Nathan Waters, in the first instance, to raise the other half, as far as that way might be found practicable; but with power, according to the decree, to raise the amount by a sale of the whole at a succeeding period, if it could be done, or in the first instance, if it should appear absolutely necessary. The report of the trustee stated, that a sale was made on the 23d of November, 1818, and that he had sold the whole of the lands decreed

to be sold, for the sum of \$10,711.50, to various purchasers, and among others, part of Snowden's Second Addition to his Manor, containing 260 acres, to James Ferree, for \$6,500. On the 26th of January, 1819, the report of the trustee was confirmed. On the 26th of February, 1819, the auditor made his report, and stated an account between the estate of Penn and Waters, and the trustee, in which the proceeds of the sale of each estate were applied to the payment of one-half of the complainant's claim, &c. and the balances respectively distributed to Nathan Waters, and the representatives of Charles Penn, deceased, viz. \$1,306.04 be distributed to the representatives of Penn, and \$3,515.06, to Waters. The auditor's report was ratified by the Chancellor, and the proceeds directed to be applied accordingly, &c. On the 25th of October, 1823, James Ferree, one of the purchasers of part of the land sold by the trustee, with his sureties in the bond by him given for the purchase money; and the said trustee, filed their petition, in which they stated, that the bond so given by Ferree had been sued—judgments thereon obtained, and *feri facias* issued on the judgments. That Ferree had sold his right to the land to one of his sureties, and that the sheriff, being unable to find any other property of Ferree and his sureties, had levied the execution on the land purchased as aforesaid, and that if the land was sold at the sheriff's sale for * cash, the debt could not be raised, &c. They prayed that the land might be sold on a credit. The Chancellor, by his order of the 25th of October, 1823, stated that the trustee was authorized to suspend the sheriff's sale, as he was the legal creditor, and had control over the judgments, and could give such directions as should appear most advisable. That as the trustee, through whom the legal title must pass, believed it would be most advantageous for the property to be sold by the trustee, any sale which should be made, not prejudicial to the interest of the complainants, would be confirmed. The trustee afterwards reported, that he had suspended the executions on the judgments against Ferree and his sureties, and had himself, on the 7th of June, 1824, sold the land formerly purchased by Ferree, to John Hoyer, for \$4,275. On the 9th of June, 1824, the original complainants, to satisfy whose claims the original decree for a sale of the lands of Penn and Waters was passed, petitioned the Chancellor, stating that the land decreed to be sold, as belonging to Nathan Waters, and re-sold, would be insufficient to pay one-half of the complainants' debt, &c. and wishing, in that case, resort should be had to Penn's estate, and praying that no payments should be made to the representatives of Penn until the debts of the complainants should be paid. On this petition the Chancellor ordered, that the trustee should make no further payments to the representatives of Penn, without the further order of the Court, &c. On the 28th of February, 1825, the Chancellor, BLAND, passed the following order: In this case the lands of two debtors, Waters and Penn, have been

sold under a decree of this Court, to pay the proportion due from each of a joint debt. The proceeds of the sales, thus made, were reported to be more than sufficient to answer the whole demand. The securities for the purchase money were the lands themselves, and the purchasers with personal securities. The purchaser of Waters' land being, as is alleged, unable to pay, or insolvent, that land itself was again sent into the market, but owing to the general depreciation of such property, it has not sold for any thing like the original purchase money, or indeed a sufficiency to pay the proportion of the debt with which Waters was charged. But when this property was taken out of the hands of Waters, and sold, the parties

476 * tacitly conceded, and the Court solemnly adjudged, by confirming the trustee's report, that a sufficiency of Waters' property had been taken to pay the debt due from him. This debt, as to him, was then satisfied; for the property being under the control, or having been disposed of by the Court, he, the original debtor, was not the guarantee of its sufficiency or safety, and consequently cannot be held liable for any loss that has happened to the fund, which has been so taken into the custody of the Court. To seize any more of Waters' property in such case would, therefore, be to make him pay his debt over again. But it is said there is an unappropriated surplus of the proceeds of Penn's property in Court, and that Penn and Waters, being jointly liable, this surplus may be applied to make good the ultimate deficiency in the proceeds of sale of Waters' property. Now if it would be unjust, as we have seen, to take any more of Waters' property to make good this deficiency, it cannot be at all equitable to take Penn's property for that purpose, since Penn and Waters, as to this debt, being jointly liable, are as one and the same debtor, and consequently Penn's property could not be touched on any principle which would not in like manner authorize the taking of Waters' property. The confirmed report of the trustee shows that more than enough of Penn's property had been sold, and consequently he is a claimant to the amount of the surplus stated to have risen from that sale, and is, in that respect, a creditor of the fund taken by the Court, who must be permitted here to stand upon as high ground as any of those creditors who brought him here as a defendant, and whose claims the Court has taken this his property to satisfy; and, therefore, if there should be any deficiency in collecting the proceeds of the property of Penn, which has been sold, such loss must be borne *pro rata*; that is, by Penn in proportion to his surplus, and by his creditors in proportion to their several established claims. It may then be regarded as a general rule, that where the property of a debtor has been sold under a decree to pay his debts, and the report of the trustee, as finally ratified, shows that enough of the debtor's property has been taken and sold fully to satisfy such claim, the debt, as

relates to the debtor, must be considered as * satisfied. And no subsequent failure, for any cause whatever, in collecting **477** the full amount of the proceeds of such sale, can justify the original creditor in again resorting to his debtor, and making a further seizure, after his property had been thus taken and sold. Therefore, it is ordered and adjudged, that the several receipts or assignments of the respective representatives of Penn, shall be and are hereby allowed in favor of the assignee claiming under them; and that the trustee apply the proceeds, as heretofore directed by an order made on the 29th of January, 1823, ratifying the auditor's report. And further, that the petition of Hoyer and others, be and the same is hereby dismissed. From which decree or order Hoyer, one of the petitioners, appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DORSEY, JJ. by *Boyle*, for the appellant, and *Magruder*, for the appellee.

MARTIN, J. delivered the opinion of the Court. We cannot sanction the rule laid down by the Chancellor in this case, and on which his last decree is founded.

The original decree directed, that the trustee should in the first instance, sell so much of the lands of Penn as would be sufficient to raise the one-half of the debt, and so much of the lands of Waters as would be necessary to make the other half; it further ordered, if a sufficient sum should not be produced by the first sale to discharge the debt, the trustee should proceed so sell the residue of the lands of both for that purpose. This course of proceeding was directed for the benefit of the debtors, as a matter of equity between them, but not to operate ultimately to the prejudice of the creditor. It was a joint debt due by Penn and Waters, each party was answerable for the whole; and we think it a clear position, that where a creditor has a right to resort to the joint and several funds of two debtors for the payment of his claim, the Chancellor has no authority to limit that right, and decree, if the funds of one debtor shall not be sufficient to discharge the one-half of the debt, the creditor shall not look to the other debtor for the * deficiency. In this case all the lands of both Penn and Waters were sold under the **478** decree, and a fund, more than sufficient to pay the debt, was produced by the sale. Whether this sum was made from the sale of Penn's lands, or Waters' lands, is a matter of no import to Hoyer. He is not interested in the inquiry. There is a fund in the hands of the trustee, or Court of Chancery, from the sale of lands answerable for his debt, and he is entitled to the whole amount of it, before the representatives of either Penn or Waters can have a claim to any part.

It has been contended that the sale made by the trustee, and the report of the auditor founded on it, and directing how the supposed surplus should be disposed of, having been confirmed by the Chancellor, Hoyer is concluded by it—that he is now too late—he ought to have made his objection before the confirmation, and while the subject was open for examination. This would be requiring an impossibility of Hoyer. At the time the sale of the trustee and report of the auditor were confirmed, it was not known any objection against the proceedings existed. The inability of the purchaser of Waters' land to pay, did not then appear, nor was it disclosed until long after the confirmation. No laches, therefore, can be imputed to him; and it would be a strange system of equity, to deprive a man of his debt for not making a defence, at a time when no defence existed.

Decree reversed.

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AGNEW vs. THE BANK OF GETTYSBURG.—June, 1828.

Where matter of defence arises from the institution of a suit, it must in general be specially pleaded, and cannot be given in evidence under the general issue. (a)

Defences arising after the commencement of the action, should be pleaded *purs darrein continuance*, or against the further maintenance of the suit. (b)

When the defendant pleads the general issue in assumpsit, he asserts that at the time of the commencement of the suit, some reason existed, which should have prevented the plaintiff from bringing his action.

So where in the trial of an action of assumpsit by a chartered company, under the general issue, the plaintiff having given a charter in evidence, by which it appeared that the duration of the company was limited to a

479 * period subsequent to the commencement of the suit, yet anterior to the time of trial, the defendant cannot avail himself of that fact to non-suit the plaintiff. (c)

Under the general issue in a suit by a corporate body, it is necessary for the plaintiff to shew its charter. (d)

Yet where such charter is a public law, which judicial tribunals are bound to notice *ex officio*, it is not necessary to give it in evidence to make out the plaintiff's title.

(a) As to what defences must be specially pleaded in assumpsit, see *Dunlop vs. Funk*, 3 H. & McH. 192.

(b) Affirmed in *Semmes vs. Naylor*, 12 G. & J. 361.

(c) Distinguished in *Canal Co. vs. R. R. Co.* 4 G. & J. 123.

(d) Approved in *Board vs. State*. 9 Gill, 399. In *Lord vs. Essex*. 37 Md. 325, it is said that there is certainly no doubt of the general proposition that where a corporation is created by statute, or under a general statute which requires certain acts to be done before it can be considered *in esse*, there those acts must appear to have been done, in order to establish the corporate existence. For, as was said by the Court in *Agnew vs. Bank*, "upon authority it is clear that the plaintiff to maintain his case, must shew that by law he has been *effectually* created a corporation."

A bank charter granted by the Governor of one of the United States, reciting his authority by the laws of that State to make such grants, and authenticated by the great seal thereof, in the absence of proof that its laws did not warrant such an exercise of authority on the part of the Governor, is sufficient evidence *per se* to prove the existence of such bank. (e)

Bills of exceptions are no part of the pleadings, and it is alone on the pleadings and verdict, that the Court pronounce judgment.

The demand of payment of a note, payable at a particular place, by one having it in possession, at such place, and on the day it fell due, is presumptive evidence of his authority to demand and receive payment.

When a note payable at the town of G. fell due on Saturday, and notice of its dishonor on that day was delivered to the endorser a resident at E. on the ensuing Monday, and no evidence was offered of any mail between those towns on Saturday or Sunday. such notice is sufficient.

APPEAL from Frederick County Court. This was an action of assumpsit, brought the 30th of July, 1824, on a promissory note, by the appellees, (the plaintiffs in the Court below,) as the holders thereof, against the appellant, (the defendant,) being one of the endorsers. The defendant pleaded *non assumpsit*, and issue was joined. At the trial of this cause on the 15th of February, 1826, the plaintiffs gave in evidence the promissory note upon which the action was brought, viz.

"Doll. 1,100.

Gettysburg, Dec. 27, 1823.

Sixty days after date, I promise to pay Charles W. Bigham, or order, at the Bank of Gettysburg, eleven hundred dollars, without defalcation—value received.

JOHN AGNEW."

Endorsed, "Charles W. Bigham, D. Agnew, Robert L. Annan." And the endorsement by Charles W. Bigham, to whose order the said note was payable, and the names of David Agnew, (the defendant,) and Robert L. Annan, appearing upon the back thereof. And then gave in evidence an agreement entered into by the counsel of the parties, "that Thaddeus Stevens, Esquire, of Gettysburg, take the depositions of * such witnesses as may be brought before him on the part of the plaintiffs or defendant, upon interrogatories to be filed, subject to such objections as the parties might make if the testimony were offered by the witnesses in open Court." And also gave in evidence the depositions of certain witnesses taken under a commission issued to the said Stevens for that purpose. William Boyd deposed, "that some time ago, the exact time not recollected, David Edie of Gettysburg, gave him three different papers, directed to David Agnew, Charles W. Bigham and Doctor Robert L. Annan, which he said were notices to them, and requested him to serve them on the parties in Emmitsburg. That on the same day he went to the house of Charles W. Bigham in Emmitsburg, where he saw John Agnew and David Agnew, and on inquiry,

(e) Cited in *Plank Road vs. Bruce*, 6 Md. 466; *Plank Road vs. Young*, 12 Md. 488.

David Agnew told him that Charles W. Bigham was not at home, but that he shortly would be, and that Doctor Annan had been there a short time before, and would also be back again soon. That he then gave all the notices to David Agnew, who read them in the presence of John Agnew, and promised to deliver them to Charles W. Bigham and Doctor Annan, that day or the next." David Edie deposed, that "he has looked at the note marked A, and that it was presented to [by] him at the Bank of Gettysburg on the 28th of February, 1824, in the afternoon of said day, for payment. That the said note was not paid when so presented; and that he, on the same day in the afternoon, protested the said note for non-payment, by proclaiming that he presented it for payment at the time and place aforesaid, and by reducing the protest to writing; and that the exhibit B, was the original protest made at the time and place aforesaid. That he made out three notices of the protest, one to each of the endorsers, to wit, Charles W. Bigham, David Agnew and Doctor Robert L. Annan; and on the first day of March, 1824, he delivered said notices to William Boyd, with instructions to deliver them to the said Charles W. Bigham, David Agnew and Doctor Robert L. Annan, respectively." The plaintiffs then gave in evidence that the signatures of John Agnew, Charles W. Bigham, David Agnew and Robert L. Annan, as they appear on the note, were the proper hand-writing of the said parties. They then gave evi-

481 dence the * following patent under the great seal of the State of Pennsylvania: This patent dated the 29th of April, 1814, recited, that "Whereas in and by an Act of the General Assembly of this Commonwealth, passed on the twenty-first day of March last, entitled, An Act relating to banks, it is, among other things provided, that when fifty or more persons in any one of the districts in the said Act enumerated, shall have subscribed not less than half the number of shares therein allotted to such district, and the sum of twenty per cent. has been actually paid on the amount so subscribed, the commissioners within such district, or a majority of them, shall certify under their hands and seals, the names of the subscribers, and the number of shares subscribed by each, with the amount so actually paid, to the Governor of this Commonwealth; and thereupon the Governor shall, by letters patent under his hand and seal of the State, create and erect the said subscribers, and if the whole number of shares allotted to such district be not then subscribed, then also all those who shall afterwards subscribe to the number aforesaid, into one body politic and corporate, in deed and in law, by the name, style and title, in the said Act affixed to the bank of such district. And whereas Robert Hayes," &c. "a majority of the commissioners named in the said Act of the General Assembly to receive subscriptions of stock for The Bank of Gettysburg, in the County of Adams, have certified to me, in writing, under their respective hands and seals, that the following named persons have subscribed

the number of shares set opposite to their respective names; that is to say, Alexander Cobean, one hundred shares, James Gettys," &c. &c. "amounting in the whole to four thousand seven hundred and thirty shares; and the said commissioners have also certified to me that the sum of twenty per cent. has been actually paid to them on the amount so subscribed. Now know ye, that in pursuance of the power and authority to me given in and by the said recited Act of the General Assembly, I, the said Simon Snyder, Governor of the said Commonwealth, do by these presents, which I have caused to be made patent, and sealed with the great seal of the State, create and erect all every of the subscribers hereinbefore particularly named, and also all those who shall hereafter subscribe to the number of * seven thousand shares, into one body politic and corporate, in deed and in law, by the name, style and title, of The Bank of Gettysburg, in the district of the County of Adams, and by such name they shall have continued succession until the first day of April, one thousand eight hundred and twenty-five; and generally to be subject to the duties, and invested with the powers, rights and privileges, for the period aforesaid, which by the law, directing these letters patent to issue, is intended; unless the Legislature shall sooner revoke and annul the chartered privileges granted. In testimony," &c. The defendant then prayed the Court to instruct the jury, that from the evidence offered to the jury, the plaintiffs were not entitled to recover. Which direction and opinion, the Court [BUCHANAN, C. J., SHRIVER and T. BUCHANAN, A. J.] refused to give. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court. 482

The cause was argued before EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

W. Schley, for the appellant, contended, 1. The plaintiff was bound to show, under the general issue, its corporate existence. The evidence adduced for that purpose was insufficient. 2. The Court below, upon the defendant's prayer, were bound to give effect to all the legal evidence in the cause, without restricting its application to the mere issue upon the pleadings. The plaintiff's dissolution was legally in evidence; and the Court ought to have granted the instruction to the jury, that the plaintiff, upon the evidence, was not entitled to recover. Even if the Court were right in refusing the defendant's prayer, their judgment ought to have been for the defendant, *non obstante veredicto*; as the plaintiff's dissolution was shown by the record. 3. There was no sufficient evidence of due demand and notice.

1. The plaintiff was bound to show, under the general issue, its corporate existence. *Henriques vs. Dutch West India Co.* 2 *Ld. Raym.* 1535; *S. C.* 1 *Str.* 612; *National Bank of St. Charles vs. De Bernales*, 11 *Serg. & Lowb.* 474; *Jackson vs. Ptumb*, 8 *Johns.* 378

Bank of Utica vs. Smalley, 2 Cowen, 770. The plea of *nul tiel corporation* is bad, * on a special demurrer, as amounting only to the general issue. *Bank of Auburn vs. Weed & Aiken*, 19 Johns. 300. The case of *Whittington vs. Farmers Bank, &c.* (5 H. & J. 489,) is not in point. It was a domestic corporation, created by a public law. Where an Act of Assembly, incorporating a bank, reserves to the State the right of subscribing for stock; and also provides for the prosecution of its directors, by indictment, in case of fraud, &c. it is a public law, and must be judicially noticed by the Court. *Towson vs. Havre de Grace Bank*, 6 H. & J. 47. The testimony adduced was not sufficient to prove the corporate existence. The Act of the Legislature of Pennsylvania under the authority of which the Governor professes to have acted, ought also to have been shown. The recital in the charter, is no proof of the existence of the law. 2 *Starkie's Evidence*, 568; *Laws U. S.* 26th May, 1790. But admitting the existence of "an Act relating to banks," does it confer the powers undertaken to be exercised by the Governor? It is not recited in *hæc verba*; and the Governor may have misconstrued the law. When a law is proved, it is for the Court to construe it, and decide upon its effect. *Conrequa vs. Willing et al.* 1 Peters, 229. The Governor may have failed to gratify all the provisions of the law. A specially delegated power must be strictly pursued. *Kerr vs. State*, 3 H. & J. 561; *State vs. Merryman*, 7 H. & J. 79.

2. The charter was *functus officio* when offered in evidence. By its own limitation the corporation was dissolved. The Court could not read part of the paper, and reject the residue. The proof was *felo de se*. There is a difference between evidence introduced by the plaintiff, and testimony offered by the defendant. The latter can give nothing in evidence, under the general issue, which has occurred subsequent to the commencement of the suit, because it would be a surprise on the plaintiff. 1 *Chitty's Pl.* 472. But the operation of evidence, when introduced by the plaintiff, would seem to be the same, as if introduced by the defendant, under an appropriate plea. The plaintiff's dissolution was a total extinction of the debt. 1 *Lerins*, 237, cited in 1 *Blk. Com.* 482; 2 *Kent's Com.* 246. There was no plaintiff in being; the attorney's warrant to appear was revoked * by the plaintiff's dissolution. But, at all events, the judgment of the Court was error, notwithstanding the issue found in favor of the plaintiff. *Le Bret vs. Papillon*, 4 East, 502. This Court will give such judgment, as the Court below should have given. *Ibid.* The inquiry is, whether the judgment is right. The appeal was prayed before the Act of 1825, ch. 117.

3. The demand was not by a proper person. The party making a demand should be competent to receipt for the money. *Chitty on Bills*, 332. The bank, being holder, and the note being there payable, the books ought to have been examined, in order to see whether the maker had provided funds. *United States Bank vs. Smith*, 11 Wheat. 177.

The Court will take notice of the calendar, of leap year, &c. 1 *Chitty's Plead.* 221. The year 1824 was leap year; and the notice to the endorser was not in due time. 2 *Stark. Evid.* 258, 269; *Chitty on Bills*, 277; *Lindo vs. Unswortt*, 2 *Campb.* 602.

Ross, for the appellee, cited 11 *Wheat.* 94; 7 *Johns.* 194; *Le Bret vs. Papillon*, 4 *East*, 506; *Gilb. H. P. C.* 106, 195; 1 *Bac. Ab.* 7; 6 *Wheat.* 262; 1 *Salk.* 278; 3 *T. R.* 186; 9 *East*, 85; *Whittington vs. Bank*, 5 *H. & J.* 489; 1 *Chitty*, 472; 2 *Stark. Ev.* 129; 3 *Serg. & Lowb.* 6; 12 *Mod.* 400; 11 *Johns.* 423; 3 *Campb.* 154; *Holland vs. Jourdine*, 1 *Holt*, 6; 3 *Blk. Com.* 301, 303; 3 *Caine's R.* 172; *Gilb. Hist. C. P.* 84; 6 *T. R.* 265; *Society vs. Wheeler*, 2 *Gallison*, 135; 7 *H. & J.* 50; 2 *Saund.* 101; 6 *East*, 416; *U. S. vs. Johns*, 4 *Dallas*, 416; *Church vs. Hubbard*, 2 *Cranch*, 187; *Griswold vs. Pitcairn*, 2 *Day*, (*Conn.*) 90; 10 *Johns.* 23; 7 *Cranch*, 420; 9 *Cranch*, 92, 98; 11 *Wheat.* 382; 5 *Johns. Ch.* 381; 18 *Johns.* 230; 3 *Cowen*, 263.

Palmer, in reply. Two important questions occur in this case. 1. Whether under the general issue plea, the defendant can give in evidence the non-existence of the plaintiffs as a corporation. 2. Whether there has been sufficient offered by the plaintiffs to entitle them to recover. On the first point, he cited *Bank vs. Weed*, 19 *Johns.* 300; *Henriques vs. West India Co.* 2 *Ld. Raym.* 1535; *Whittington vs. Farmers Bank*, 6 *H. & J.*; *Towson vs. Havre de Grace Bank*, *Ib.* 47; 2 *Kent's Com.* 246; 2 *Bac. Ab.* 3; *Sutton's Hospital*, 10 *Coke*, 33; *Gilbert vs. Col. Turnpike Co.* 3 *Johns. Cas.* 107; *Inhabitants vs. Penhurst*, 2 *Salk.* 473; *Portsmouth vs. Watson*, 10 *Mass.* 91; *Whitcroft vs. Dorsey*, 3 *H. & McH.* 357; *Legrand vs. Hampden Sydney*, 5 *Munford*, 324; *Pearl vs. Allen*, 2 *Tyler*, 311. On the second point, 2 *Kent Com.* 246; 1 *Blk. Com.* 484; *Kyd on Corp.* 516; *Colchester vs. Seaber*, 3 *Burr.* 1868; *Co. Litt.* 13 b; 1 *Chitty Pld.* 215; *Sullivan vs. Montague*, 1 *Doug.* 106; *Baylies vs. Fettyplace*, 7 *Mass.* 325; 3 *Burr.* 1345. 3. No legal demand has been made of the drawer of * the note for payment. The demand must be made by a notary public, or a known officer of the bank, the holder of the note. It must be by a person authorized to make it, and to receive payment. *Chitty on Bills*, 333; *Bank of Utica vs. Smith*, 18 *Johns.* 230. **491**

ARCHER, J. delivered the opinion of the Court. The various questions which have been discussed arise on the general prayer that the plaintiff is not entitled to recover.

The general issue having been plead, the plaintiff, to support the issue on his part, and to show that at the commencement of the suit he had a right to sue, offered in evidence letters patent issued by the Governor of Pennsylvania under the great seal of that State, whereby it appeared that the Gettysburg Bank, anterior to the suit, was a regularly chartered company of that Commonwealth. By the same letters patent it appears that the charter of the bank had, by its own limitation, expired between the time of bringing the suit,

and the time of trial. The defendant contends, that as it appears from the letters patent that the charter had expired, and that the corporation was extinct, he had a right to use the same as evidence under the issue, and as it thus appeared the corporation had no longer any existence, the plaintiff was not entitled to recover.

The cases are very conclusive to shew, that where matter of defence arises after the institution of the suit, it must in general be specially plead, and cannot be given in evidence under the general issue, as in the case of of a release given after the commencement of the suit, or a reference and award made *pendente lite*, or hostile alienage happening after the commencement of the action, or coverture of the plaintiff after action brought, or any matter of abatement occurring after suit brought, or after plea pleaded to the merits. All other matters which go to the foundation and gist of the plaintiff's action, at the time of its commencement, with some very special exceptions, which it would be unnecessary to enumerate, may be given in evidence under the general issue. Defences arising after the commencement of the action, should be plead *puis darrein continuance*, or against the further maintenance of the suit. It was said by Lord Mansfield, in **492** *Sullivan vs. Montague* * 1 *Doug.* 106, that *actio non* went to the time of plea pleaded, and not to the commencement of the action; but this doctrine has been overruled, by subsequent cases, as departures from the law; 3 *T. R.* 185; 4 *East*, 503; and the rule now is, that when the defendant pleads the general issue in assumpsit, he asserts, that at the time of the commencement of the suit some reason existed which should have prevented the plaintiff from bringing his action. This doctrine is supported by several cases of high authority, and by esteemed compilers and elementary books on pleading. It is a doctrine too, as we apprehend, in general founded in justice, and calculated to prevent surprise. *Chitty's Plead.* 531, 635, and the authorities there referred to.

If then the defendant could not, under the general issue, have given in evidence the dissolution of the charter subsequent to the institution of the suit, it is quite impossible to say that he can nevertheless avail himself of the fact to nonsuit the plaintiff, because that fact appears in the letters patent, which the plaintiff is compelled to adduce. Whether the bank was dissolved or not pending the suit, was not in issue, and the fact of the dissolution of the charter having taken place after the commencement of the action, was not pertinent to the issue, and was not in evidence before the jury. The fact which the jury had to ascertain was, whether the corporation had a right to sue at the commencement of the action.

It is, however, said, that by the dissolution of the charter of the bank, the debts due to it were extinguished, that this therefore is matter which goes to the merits of the defendant's case, and can be given in evidence under the general issue. It is not necessary that we should express any opinion on the question how far the debts of

a corporation are extinguished by the dissolution of its charter, whatever our views on that question may be, not considering that its determination is necessarily involved in this case, for we have seen that such a defence, arising after the commencement of the suit, would be no bar to the suit, where the defendant chooses to rest his defence on the general issue. On the admission of the correctness of the above doctrines, the defendant contends, that it was necessary it should be shewn on the trial, to enable the bank to maintain * the suit, that it was incorporated, and that if necessary **493** the evidence adduced is insufficient for that purpose.

That, on the general issue, it was necessary for the plaintiff to shew its charter of incorporation, is clear, as will be seen by a reference to the following authorities. 2 *Ld. Raym.* 1535; 1 *Strange*, 612; 2 *Bac. Ab.* 212. This law is adopted in New York by numerous decisions. 8 *Johns.* 375; 14 *Johns.* 245; 19 *Johns.* 300; 2 *Cowan*, 378.

At first view it might be supposed that this question had been decided differently in the *Farmers Bank vs. Whittington*, 5 *H. & J.* and that the want of a charter could only be taken advantage of by a plea in abatement. But an attentive examination of the case will shew that such was not the judgment of the Court. The charter of the Farmers Bank of Somerset was a public law, which judicial tribunals were bound to notice, and being such, the plaintiff could not, before he could make out his title to recover, be called upon to shew in evidence that which the Court were bound *ex officio* to notice.

Upon authority it is clear that the plaintiff, to maintain his case, must shew that by law he has been effectually created a corporation.

Has the plaintiff exhibited evidence that the bank was duly incorporated? This evidence consists solely in a charter granted by the Governor of the State of Pennsylvania to the bank, reciting his authority, by the laws of that State, to make such grants, and authenticated by the great seal of that State. The evidence thus offered, it is said, is deficient in this, that the laws of Pennsylvania, authorizing the Governor to issue his letters patent, in this respect should be proved to the Court as other facts are proven, that the Court might adjudge and determine whether the Governor had complied with his powers. This objection is grounded by the counsel upon the general and well established principle, that specially delegated authorities must be strictly pursued, and that the Court must have before them what will enable them to say whether these powers have been legally pursued or lawlessly transcended. But we think, that when the foundation of this principle is examined, it will be found inapplicable to the present case. This strictness in the execution of special authorities, is demanded, because every * delegation of them **494** is in derogation of the common law, and of the rights conferred by it on the citizen. Have we judicial notice from the record, or otherwise; that this special power, delegated by a law of the Com-

monwealth of Pennsylvania, derogates from the rights of her citizens? The rights of her citizens, (except as members of the Union,) we mean their rights derived from her own municipal regulations, cannot be noticed by us. If the defendant had desired to place himself in a proper attitude to raise the objection, he should have exhibited proof in the record that the grant of this charter, as made, derogated from the rights of individuals as established by the laws of that Commonwealth. The laws securing those rights, alleged to have been trespassed upon by this charter, should have been proven as other facts; until that was done, the question obviously could not arise.

But in any aspect which can be given to the case, can this act of the Governor be classed among the cases of special authorities, and subjected to all the limitations and restrictions which judicial determinations have put upon the execution of such power? It is on his part neither the exercise of a judicial or ministerial authority, but the fulfilment of a high executive trust and confidence; and it would certainly be demanded by that comity which is due from one sovereign State to another, that we should presume, until the contrary is proven, that the public acts of the Chief Magistrate of such State, purporting to be in execution of the laws, were legitimate acts, and within the scope of his powers as such officer, until the contrary is established by the proof of the laws themselves, by which it should be made to appear that he had overstepped the boundaries prescribed to him.

But it is contended by the defendant, that notwithstanding the Court might have been right in the general direction which they gave, yet that, as it appears from the evidence in the bill of exceptions that the corporation was dissolved, the Court were still bound, although the verdict was for the plaintiff, to have entered judgment for the defendant. In answer to this it may be briefly said, if there were not other objections to such a course, that the defendant would be in no condition to have made such a requisition on the Court, until it had been spread * upon the pleadings in the cause,
495 that the charter had expired, and such fact stood admitted by the pleadings. The bill of exceptions is no part of the pleadings, and it is alone on the pleadings and verdict that the Court can be called upon to pronounce judgment.

The last question for our examination is the sufficiency of the demand and notice. The note was demanded at the Bank of Gettysburg, the place at which it was payable, and on the day it was due. The demand is proven to have been made by one having possession of the note for demand, and at the place where payable, which will furnish presumptive evidence of his authority to demand and receive.

The note fell due on Saturday, and notice was sent and delivered on Monday. It is said it should have been put in the mail at an earlier day than Monday. But there is no evidence there was any

mail either on Saturday or Sunday. It cannot be pretended that it was necessary to send an express, and that too on Sunday. The notice, under the circumstances of the case, was sufficient.

Judgment affirmed.

J. W. & R. H. OSGOOD *vs.* LEWIS.—June, 1829.

After verdict, the allegation of fraud and deceit in a declaration, is equivalent to the charge of an actual *scienter*.

In cases of express warranty, averments of fraud and deceit are immaterial. Warranties on the sales of personal property have usually been divided into two classes, express and implied.

To create an express warranty, the word warrant need not be used, nor is any precise form of expression required; any affirmation of the quality or condition of the thing sold, (not uttered as matter of opinion, or belief,) made by the seller at the time of sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty. (a)

In cases of oral contracts it is the province of the jury to decide upon the existence of the ingredients necessary to constitute a warranty. (b)

But in cases of written contracts, whether the instrument contain an express warranty or not, the Court must determine. (b)

Implied warranties arise by operation of law; they exist without any intention of the seller to create them, and may properly be divided into two kinds.

* The one is untinged by actual fraud or deceit, as the warranty of title, that provisions purchased for domestic use are wholesome— **496** and in executory contracts, or where the purchaser had no opportunity of inspection, that the article contracted for shall be saleable as such in the market. (c)

(a) Cf. *Crenshaw vs. Slye*, 52 Md. 140.

(b) Approved in *Horn vs. Buck*, 48 Md. 370.

(c) Explained in *Hyatt vs. Boyle*, 5 G. & J. 119. It is a general principle that in sales of personal property the seller is not answerable for any defects in the article sold, unless there is an express warranty or fraud. *Ibid*; *Wheat vs. Cross*, 31 Md. 99; *King vs. Clogg*, 40 Md. 352. But in a sale of goods by description, when the buyer has not inspected the goods, there is, in addition to the condition precedent that the goods shall answer the description, an implied warranty that they shall be saleable or merchantable. *Hyatt vs. Boyle, supra*. This exception to the rule of *caveat emptor* only applies to these cases where examination at the time of sale is, morally speaking, impracticable. *Ibid*. In a sale of goods by sample the vendor warrants the quality of the bulk to be equal to that of the sample. *Gunther vs. Atwell*, 19 Md. 157. But the mere exhibition of a sample by the seller and examination of it by the buyer, does not amount to a warranty, unless it appear from the facts of the case that the parties understood that the bulk was to correspond with the sample. *Ibid*. Cf. *Barnard vs. Kellogg*, 10 Wallace, 883. As to the warranty implied where an article is bought for a particular purpose made known to the seller at the time of the contract, see *Rice vs.*

Other implied warranties are where fraud and deceit are of their very essence, as in cases where the seller of any article knowing of its unsoundness, uses any disguise or artifice to conceal it, or represents it, (whether in the way of expressing opinion, or belief, or otherwise,) to be exempt from such defect. (d)

Implied warranties are not conclusions or inferences of fact drawn by a jury, but conclusions of law pronounced by the Court absolutely, upon facts admitted or proved before the jury, or hypothetically, where the facts are controverted.

In actions on the case upon implied warranties, where the knowledge of the defendant is not an essential ingredient of the plaintiff's right of action, it need not be alleged nor proved.

The statement in a bill of parcels for a quantity of oil, that it was "winter pressed sperm oil," is an express warranty by the vendor, that such oil was winter pressed. (e)

There is a distinction between oral and written contracts, that in the former much of the *colloquium* was never intended or understood by the parties to be essential component parts of the contract, while in the latter nothing is inserted which is immaterial, no fact stated which is not presumed to be relied upon by the parties; and for the truth of which the one does not bind himself to the other; upon this principle mere recitals in deeds have been held to be covenants.

APPEAL from Baltimore County Court. This was an action on the case brought on the 27th of March, 1822, by the appellants, (the

Forsyth, 41 Md. 407. Where a known, described and defined article is ordered, even of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described and defined thing be actually supplied, there is no implied warranty that it shall answer the particular purpose intended by the buyer; in such case the purchaser takes upon himself the risk of its effecting his purpose. *Rasin vs. Conley*, 58 Md. 65. As to implied warranty of title, see *Heskett vs. Borden Co.* 10 Md. 185; *Rockwell vs. Young*, 60 Md. 566, citing the case in the text and *Giese vs. Thomas*, 7 H. & J. 333, note (b). As to the remedies and defences of a buyer for breach of warranty, see *Rutter vs. Blake*, 2 H. & J. 302, note; *Clements vs. Smith*, 9 Gill, 156; *Taymon vs. Mitchell*, 1 Md. Ch. 496; *Horn vs. Buck*, 48 Md. 372; *Rasin vs. Conley*, 58 Md. 59.

(d) See *Johnston vs. Cope*, 3 H. & J. 66; *Taymon vs. Mitchell*, 1 Md. Ch. 496; *King vs. Clogg*, 40 Md. 353; *Gent vs. Ensor*, 41 Md. 24.

(e) In *Benjamin on Sales*, sec. 600, it is said that a sale by description involves a condition precedent, and that a description is not a warranty. "A warranty is an express or implied statement of something which a party undertakes shall be a part of a contract, and though part of the contract collateral to the express object of it. But in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and a breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as if a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas, the contract is to sell peas, and if he sells him anything else in their stead, it is a non-performance of it." Cf. *Gunther vs. Atwell*, 19 Md. 171.

plaintiffs in that Court,) against the appellee, (the defendant in the said Court.) The declaration contained four counts. The first count stated, "that whereas the plaintiffs, copartners, trading under the firm of Osgood and Company, heretofore, to wit, on the 1st of December, 1821, at Baltimore County aforesaid, at the special instance and request of the defendant, bargained with the defendant to buy of him a quantity of oil; that is to say, 115 casks, containing 9,547 $\frac{3}{4}$ gallons, at and for a certain price or sum of money, to wit, the sum of \$10,780.93; and the defendant, by, then and there, falsely and fraudulently representing the said oil to be of the quality of the best winter pressed spermaceti oil, then and there sold and delivered the said oil to the plaintiffs at and for the sum of money aforesaid, which was then and there paid by the plaintiffs to the defendant, for the same; whereas in truth * and in fact the said oil was not the best winter pressed spermaceti oil, as represented by the defendant, **497** but of a greatly inferior quality, which he, the defendant, well knew at the time of the sale and delivery thereof as aforesaid; and the plaintiffs in fact say, that the defendant, by means of the premises, on the day and year aforesaid, at the county aforesaid, falsely and fraudulently deceived them, the plaintiffs, on the sale of the said oil, and thereby the said oil became of no use or value to the plaintiffs, to wit, at Baltimore County aforesaid."

Second count. "And whereas also, the plaintiffs afterwards, to wit, on the day and year last aforesaid, at Baltimore County aforesaid, bargained with the defendant, to buy of him a certain other quantity of oil, to wit, 115 casks, containing 9,547 $\frac{3}{4}$ gallons; and the defendant by, then and there, falsely warranting the said last mentioned oil to be best winter pressed spermaceti oil, falsely and fraudulently induced the plaintiffs then and there to buy of him, the defendant, the said last mentioned oil, for a certain other large price or sum of money, to wit, the sum of \$10,780.93 of like current money; whereas, in truth and in fact, the said last mentioned oil, at the time of the said last mentioned warranty and sale, was not the best winter pressed spermaceti oil, but was of a greatly inferior quality, and of no use or value to the plaintiffs, to wit, at the county aforesaid."

Third count. "And whereas also, the plaintiffs afterwards, to wit, on the day and year last aforesaid, at Baltimore County aforesaid, bargained with the defendant, to buy of him a certain other quantity of oil, to wit, 115 casks, containing 9,547 $\frac{3}{4}$ gallons, and the defendant then and there falsely representing the said last mentioned oil to be winter pressed spermaceti oil, falsely and fraudulently induced the plaintiffs then and there to buy of him, the defendant, the said last mentioned oil, for a certain other large sum of money, to wit, the sum of \$10,780.93, of like current money, then and there paid by the plaintiffs to the defendant, for the same; whereas, in truth and in fact, the said last mentioned oil, at the time of the said last men-

tioned representation and sale, was not winter pressed spermaceti oil, but of a greatly inferior quality, which he, the defendant, well
498 knew at the time of the last mentioned *representation and sale; and the plaintiffs in fact say, that the defendant, by means of the premises, on the day and year aforesaid, at the county aforesaid, falsely and fraudulently deceived them, the plaintiffs, on the sale of the said last mentioned oil, and thereby the said last mentioned oil became of no use or value to the plaintiffs, to wit, at Baltimore County aforesaid.”

Fourth count. “And whereas also, the plaintiffs afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, bargained with the defendant to buy of him a certain other quantity of oil, to wit, 115 casks, containing 9,547½ gallons; and the defendant by, then and there, falsely warranting the said last mentioned oil to be winter pressed spermaceti oil, falsely and fraudulently induced the plaintiffs then and there to buy of him, the defendant, the said last mentioned oil, for a certain other large sum of money, to wit, the sum of \$10,780.93, of like current money; whereas, in truth and in fact, the said last mentioned oil, at the time of the said last mentioned warranty and sale, was not winter pressed spermaceti oil, but was of a greatly inferior quality, and of no use or value to the plaintiffs, to wit, at Baltimore County aforesaid. And so the plaintiffs say, that the defendant has falsely and fraudulently deceived them, the plaintiffs, on the sale of the said last mentioned oil as aforesaid, to wit, at the county aforesaid, to the damage of the plaintiffs in the sum of,” &c. The defendant pleaded not guilty, and issue was joined.

1. At the trial the plaintiffs offered in evidence that they are merchants, residing in the City of Baltimore, and trading under the firm of Osgood and Co. and that they have been so residing in the said City of Baltimore, and carrying on trade and commerce, under the aforesaid name and style of Osgood and Co. from the year 1820, continually up to this time; and that Osgood and Co. mentioned in the bill of parcels hereinafter inserted, as the purchasers of the oil mentioned in the said bills of parcels from the defendant in this case, and the plaintiffs in this case, are the same persons; and that the plaintiffs purchased the said oil from the defendant, and received the same, and the said bill of parcels, under the name and style of
499 Messrs. Osgood and Co. And further proved that the *defendant sold to the plaintiffs in this cause a quantity of oil, as stated in the following bill of parcels:

“Baltimore, November 21st, 1821.

Messrs. Osgood & Co. Bo’t. of Peter Lewis,

115 casks of Winter Prest Sperm Oil. Gages 29,” &c.

“Gallons.. . . . 9,547½

1,600 gs. a 115 cts. \$1,840

7,947½ a 112½ cts. 8,944 93

Received Payment in full, by sundries, up to the 5th December, 1821. PETER LEWIS."

Which said oil was delivered between the twenty-first day of November, and the fifth day of December, inclusive, in the year 1821, on which latter day the defendant signed and delivered the bill of parcels, and receipt thereunder written, to the plaintiffs; and which were offered and read in evidence, the same having been proved to be in the hand-writing of the defendant. That a part of said oil was immediately, upon the landing thereof from the defendant's vessel on the wharf, and after the delivery thereof to the plaintiffs, sold by them to different individuals in the City of Baltimore, and immediately taken from the wharf by such purchasers. That part thereof, to wit, about twenty barrels, were stored in the second floor of plaintiffs' warehouse in said city, a part on the first floor of that and the adjoining warehouse, a part in a brick stable belonging to the plaintiffs, situated in said city, and part thereof was sent by packet from the wharf, and before it was stored, consigned by the plaintiffs to a house in Alexandria. Part of the oil was sent from the wharf before being stored, to Gregg and Co. merchants, carrying on business in Franklin street, in said city, and received and deposited by them in their cellar, to be by them retailed or sold for the plaintiffs. The plaintiffs further offered evidence that the oil, so sold and delivered to them by the defendant, at the time of said sale and delivery, was not winter pressed oil; and that the oil so sold and delivered by the plaintiffs to such persons, and by them taken immediately from the wharf, was carried by them to their respective houses and stores, and there deposited in suitable and judicious places, and carefully kept by them; that the said oil * proved to be oil of inferior quality, and not winter pressed oil. A large part of the oil sold to the plaintiffs, and by them stored, as well as the oil sent to Alexandria, proved to be of the like bad character and quality, and that a great part thereof was summer oil and of inferior quality; that the same congealed, and became unfit for use; that part of the oil shipped by them to Alexandria was returned by the consignee as not being winter pressed, and as being unfit for use; that persons in the habit of purchasing oil, refused to purchase of the plaintiffs, in consequence of which the principal part of the said oil remained unsold, and on the plaintiffs' hands. That upon discovering that the said oil was not winter pressed, but summer oil, and of inferior kind, the plaintiffs gave notice to the defendant, by the following letter, that the said oil was not winter pressed, and of the kind represented in the bill of parcels, and required the defendant to take the same back. "Baltimore, 22nd Dec. 1821. Capt. Peter Lewis. Dr. Sir,—We have sold several casks of the oil bo't of you, and warranted by you to us of the best kind winter press'd sperm oil, the purchasers have complained of the quality, and pronounce it very bad. Their opinion has prevented our making sales, and will probably be a great injury to

us—we shall hold you accountable for all damages for loss sustained by us in consequence of the bad reputation the oil has acquired, and from its bad quality—if the d'tt for the balance of the acc. is not negotiable, you will not— (Signed) OSGOOD AND Co.”

That the defendant admitted that he had sold the oil, as the best winter pressed oil, and that the said oil was not what he sold it for, (to which evidence the defendant objected, so far as it contradicted the bill of parcels,) and the plaintiffs ought to be made whole, but did not take back the same, or reimburse the plaintiffs. That a great part of said oil was congealed, and some of it as thick as lard or turpentine. That it so remained congealed through the month of March, a part until April, and a part of it remained congealed until the month of July, 1822. The plaintiffs further offered evidence that winter pressed oil, is that oil which is pressed in cold and freezing weather, in the winter season, and that it will not congeal in ordinary

501 * winters in the climate of the City of Baltimore, and although it will congeal, when exposed in an open place to a great degree of cold, yet it will return to its original limpid state upon a change of the weather, and its becoming more moderate. The plaintiffs further offered evidence that oil which congealed entirely through when the thermometer was at 20 degrees, if kept in the same warehouse would resume its limpid state when the thermometer rose to 40, in the opinion of the witness, in ten days, and if it congealed at zero entirely through, upon the thermometer rising to forty-six, he believes it would resume its limpid state in ten days. The witness has not seen the experiment, but was brought up at Nantucket; has had a considerable opportunity of obtaining information of the character of oil, and the effect of the weather upon it; that summer oil is the oil prepared during warm weather; that it will congeal in any weather colder than that in which it was made; will not stand an ordinary winter in Baltimore; and is not then fit for use at that season of the year. That winter pressed spermaceti oil, as known and understood in the trade of the City of Baltimore, was spermaceti oil, that will remain limpid, during the ordinary winters, in the climate of the City of Baltimore, when kept in casks in a warehouse, or when kept in casks in a proper place; and that the word sperm, in the said bill of parcels, means the same thing, and is an abridgment of the word spermaceti; that the price, at the time of the sale herein before mentioned by the defendant to the plaintiffs, was, in the City of Baltimore, sixty-five cents per gallon, by the quantity for summer oil, and 120 cents per gallon for winter pressed, when sold by the single cask, and 125 cents for the latter, when sold by the gallon. That the plaintiffs employed, after the 26th of March, but in that month, 1822, a skilful person to take charge of, cooper, and keep in the best situation, such parts of said oil as had not been by them sold off as aforesaid, until some disposition thereof should be made, which was accordingly done, and the same kept in judicious and suitable places.

That during the preceding winter, the same person coopered the casks, and kept them tight and in order. That such part of said oil, so placed, was, by direction of the plaintiffs, sold to the highest bidders at public * auction in the City of Baltimore, in the month of November, 1822, by one of the licensed auctioneers of the City of Baltimore, after due notice of said sale; that by the sale of said oil, the plaintiffs lost the sum of \$4,270.09, and which with interest to the 10th November, 1825, amounts to the sum of \$5,236. That before the said sale at auction, the plaintiffs gave the following notice to Henry Payson and Co. merchants in the City of Baltimore. "Baltimore, 25th October, 1822. Messrs. Henry Payson and Co. Gent.—We hereby give you notice, that we shall on the 13th November, next, sell the oil at auction, which was purchased by us last fall of Capt. Peter Lewis, and by him warranted to be of a quality, which it was not, and on account of which, we have instituted a suit against him. You are, therefore, as the agent of the said Lewis, or of his employers, hereby notified of this intended sale, to act as seems to you proper in this case.

(Signed)

OSGOOD AND CO."

And which notice was received by the said Payson and Co. on the day of its date, and was produced on the trial of this cause by the defendant, upon notice being given to him for that purpose by the plaintiffs. And also proved, that the contents of said notice was communicated to the defendant by the said Payson and Co. by letter, put in the post-office in said city, on the same day. The plaintiffs further proved, that they were merchants, carrying on business in the City of Baltimore, but have never been in the habit of purchasing or selling oil, the cargo purchased of the defendant being their first purchase of that article in a large quantity, and were not judges of the article. That at the time they purchased the oil, and also, when the same was delivered on the wharf from the vessel, the whole of it was perfectly limpid, in which state, it was proved, that summer, fall and winter oil, cannot be distinguished from each other by those in the habit of dealing in that article, and best acquainted with it; and offered evidence, that at the time of the sale and delivery of the oil aforesaid, the weather was mild. They further proved, there was no public inspection in the City of Baltimore, of oil, and that the defendant was a captain sailing between Nantucket and the City of Baltimore, and was in the habit of buying and selling * oil upon his own account; that he was not in the habit of dealing with the plaintiffs, never having dealt with them except on one occasion, when he purchased a quantity of flour, for which he gave them his own promissory note; and no evidence was offered that the defendant, at the time of the sale of said oil and delivery thereof, did represent to the plaintiffs that he was selling said oil as the agent of other persons, or that he disclosed the names of any person interested therein, if such there were. It was further given in evi-

dence by the plaintiffs, that the defendant represented that he had brought the said oil from Nantucket, where the same was made, and at which place he resides. They further gave in evidence, by Christian Mayer, that all three meteorological tables which were produced in evidence by the defendant, up to the first of January, 1822, were kept in the country parts of the City of Baltimore, in an elevated situation, about a mile and a half from Bowley's wharf; that it is high, and exposed to the winds, sheltered to the north-west by a woods, but exposed to the north-east, and no houses are near to the said situation where the thermometers were kept, and that it is ordinarily colder there in winter, and warmer in summer, than in the settled parts of the city, including Bowley's wharf; that in the opinion of the witness such situation does not exceed two degrees of cold in the winter over such settled parts; that the tables referred to were taken from the thermometers, one situated on the south-east side of the house, one in a passage on the north-east, and the other in the balcony on the north-east; that the thermometers aforesaid were kept in the situation before described until the end of the year 1821; and for the years 1822 and 1823, they were kept in the settled parts of the City of Baltimore; that witness is confident of the correctness of Mr. Brantz, who kept the tables; that in the opinion of the witness, judging from the tables; there was no ice in the basin from the twenty-first day of November to the fifth day of December, 1821, unless there might be a little on the edge of the basin; that ice forms more readily at the same temperature late in the winter season, than at the commencement of the season. The plaintiffs further gave in evidence, that summer oil, when taken out of the hold of a vessel,

504 will not congeal in the course of a * single night, even at a low temperature of the atmosphere. And further gave in evidence the following copy of a letter from them to the defendant, proved to have been written by them, and put into the post-office in Baltimore, directed to him at Nantucket—the defendant having received due notice to produce the original.

“ Baltimore, 21st June, 1822.

Capt. Peter Lewis, Sir—The oil which we bought of you on the 21st November last, and warranted to be pure winter strained, being of different quality from what it was represented, as you have long since been informed, and relative to which a suit is now pending, is every day wasting, and for the interest of all concerned, had better be sold. As it will probably be sacrificed if sold at auction, being an unusual way of selling that article, we propose, that by consent of both parties, and without prejudice to either, that it be put into the hands of Messrs. Payson & Co. who are your friends, and special bail in this case, for sale, and the nt. pds. to be paid over to us.

Your ob't serv'ts,

[Signed,]

OSGOOD & Co.”

And also gave in evidence, that the oil so purchased from the defendant, and delivered by him to the plaintiffs, was all stored in proper and suitable places for winter pressed oil, during all the time it was in their possession; and further, that some of the said oil was good winter pressed oil, and continued limpid during the severest weather of the winter of 1821 and 1822, while stored in the warehouse of the plaintiffs, and elsewhere, which warehouse was proved to be in good condition, unusually well built, and protected with shutters, and was kept closed on the back of the first floor, and wholly closed in the second floor during the said winter. And further gave in evidence the following deposition of Richard Lemmon: "The deposition of Richard Lemmon, a witness produced, sworn and examined, on the part of the plaintiffs, and agreed to be read in evidence in the above cause. Deponent is one of the firm of Robert Lemmon and Company, auctioneers in the City of Baltimore, and was so in the months of October and November. In the year 1822 deponent was * applied to in one of the said months by plaintiffs, to advertise for sale a quantity of oil, which had been partly 505 stored in the old exchange, where the whole of it was sold, with the exception of two casks of summer strained oil, which was sold last. The advertisement was accordingly published in one of the Baltimore newspapers, which states that the said oil would be sold for account of whom it might concern; and deponent believes that a longer notice than usual was given of said intended sale. On the 13th of November in said year, the sale of said oil commenced at public auction. Deponent acted as crier on the said day; fifty-one casks and barrels of said oil were sold at public auction; six casks of which were winter strained oil. On the same day, thirteen casks of winter strained oil were sold at private sale, which had been previously offered at public auction, but was not sold, because it would not bring a sufficient price; of the six casks of winter strained oil, which were sold at public auction as aforesaid, one cask brought seventy-seven cents per gallon, one seventy-six cents and an half per gallon, and the other four seventy-five cents per gallon. The thirteen casks which were sold at private sale as aforesaid, were sold at seventy-five cents per gallon, the sale of winter strained oil being stopped on that day, because it would not bring seventy-five cents per gallon. The sale of the said thirteen casks at private sale, was beneficial to the owners of said oil, because if the sale at public auction had been pushed, it would not have brought so good a price. On the 14th of November, in said year, seven casks of winter strained oil, were sold at private sale, for seventy-five cents per gallon. On the 18th of said month, two casks of said oil were sold at private sale, and on the 19th of said month, three casks of said oil were sold at private sale. On the 26th of said month the sales of said oil were closed, with two casks of summer strained oil. The particulars of the sale of said oil, as furnished by the firm of Robert

Lemmon & Co. to the plaintiffs, in which the quantity sold, and the respective prices thereof, will appear by a reference to exhibit R. L. herewith filed; all the oil which was sold as winter strained oil, this deponent, by the orders of the plaintiffs, warranted as such to the purchasers. No warranty as to the balance of said oil, being winter strained, was * made, but the purchasers were left to judge for
506 themselves; but deponent stated at the time of sale that some of it might have been strained in the fall, and some of it in the summer. It was in the first place announced by deponent as summer strained oil, but he was stopped by one of the plaintiffs who stated to him that a part of said oil might have been strained in the fall, and part in the summer, and desired the deponent to sell the oil without warranty as to quality, but permit the purchasers to judge for themselves. Deponent made this representation to the purchasers, and the sales went on." [Here follows the exhibit R. L. referred to in the foregoing deposition.

The amount of sales.....	\$3,729.39
Charges deducted.....	94.71
	<hr/>
	\$3,634.68]

And proved by a cross-examination of the defendant's witnesses, that all those who purchased the oil as aforesaid, under such auction sale, (which was not warranted winter pressed,) sold or retailed the same as summer oil; and that the cask bought by one Butler, at the said sale, proved to be very bad summer oil, and not fit for use. And further, that the oil bought for winter pressed, sold at retail from one dollar to one dollar and twenty-five cents per gallon, and that which was not warranted winter pressed, sold by retail from sixty-two cents to one dollar. And the plaintiffs further gave in evidence that winter pressed oil, sold by retail by the gallon, in the winter of 1821 and 1822, at one dollar and fifty cents per gallon. The plaintiffs further gave in evidence, that the defendant admitted that some of the oil which he had previously sold as aforesaid to the plaintiffs, nobody could pretend to call winter pressed oil, and that the plaintiffs ought to be made whole; and he further added, that he had been deceived himself in the quality of the said oil. And further gave in evidence, that the defendant admitted that the oil was not as good as he sold it for.

The defendant then gave in evidence, that before, and at the time of the sale of the said oil by the defendant to the plaintiffs, said oil was lying at Bowley's wharf, in the City of Baltimore, near to the ware-
507 house of the plaintiffs, and that between * the 21st of November, 1821, and the 5th of December, 1821, the same was landed on said wharf, and while so lying, was gauged by the city gaugers, they taking out the bungs of each cask and barrel, and inserting therein the gauging rod in each cask, for the purpose of ascertaining its contents; that while the said bungs were so out, and

when the quantity of said oil was shipped as proved by the plaintiffs, to Alexandria, the clerks and agents of the plaintiffs saw the same, and that it was then limpid. The defendant further gave in evidence, the meteorological tables. He further gave in evidence, that what is termed summer oil, will, when the weather is at the freezing point, show itself by congealing, and even before the weather becomes so cold, that what is termed fall oil, will, in the same weather, also discover itself. He further gave in evidence, that all the said oil sold by the defendant to the plaintiffs, was winter pressed oil, and was pressed by the manufacturers at Nantucket, in the months of January and February, 1821, during the most favorable weather for making the best winter pressed oil, and of the best stock of materials. He further gave in evidence, that all of the said oil was made at Nantucket, in Massachusetts, and was shipped from that port by the manufacturers and owners, on board the defendant's vessel, consigned by them to the defendant as their agent. The defendant further offered in evidence the depositions of sundry witnesses, for the purpose of proving that the defendant received the said oil from the shippers, as winter pressed, and under a representation of its being winter pressed. [The evidence here produced taken under commissions issued for that purpose, was very voluminous, and which it has been deemed unnecessary to insert.] The defendant further gave in evidence, that he made the said sale to the plaintiffs, for and on account of the shippers and owners at Nantucket, but made no statement to that effect to the plaintiffs, or informed them of any agency, or disclosed the names of his owners to them; and that he paid over the proceeds of the oil to the owners and shippers, as stated in the said depositions. The defendant further gave in evidence, that after the date of the said letter of the plaintiffs of the 22d day of December, 1821, the plaintiffs retained the possession of the said oil, and from the time of the sale to * them, and as low down as the 9th of March, 1822, the plaintiffs continued to sell the oil as **508** their own, both by wholesale and retail; and sold in their own names, thirty-four casks of the said oil as winter pressed oil, and advertised the same for sale as winter pressed oil as late as the 6th of February, 1822. The defendant further gave in evidence, that some part of the said oil was purchased by certain persons at the sale made by the auctioneer, as stated in the plaintiff's evidence, as summer oil, and at the price of summer oil; and further gave in evidence that this part of said oil remained limpid during the whole of the winter, and if it had been sold to them as winter oil, it would not have been complained of by the said purchasers; and further gave in evidence, that summer oil would not continue limpid during the winter, if exposed, as this was, by the said purchasers. And the defendant offered evidence in order to show that the said oil was winter pressed oil, that one cask sold at the said auction to Groom, who had for many years kept a grocery store on Fell's Point, sold to him

as not winter pressed oil, and at a summer oil price; that he kept the said oil in his cellar, which was not deep, and had a northern exposure, and that it remained limpid during the winter, and that he never had better oil. The defendant further gave in evidence, that the oil that is pressed in the winter months is called and known, and sold, as winter pressed oil, and that oil pressed during the winter, and when Fahrenheit's thermometer is below thirty degrees, is called and esteemed the best winter pressed oil; that winter pressed oil will congeal if exposed to weather colder than that in which it was pressed. He further gave in evidence, that the places in which the plaintiffs kept this oil, were not safe and proper places to keep winter oil through the winter season, and that the congealing of such oil, in such places, in the winter, is no proof of its not being winter pressed oil, and that winter pressed oil, once congealed, will remain congealed until warm weather. The defendant further gave in evidence, by the declarations of the defendant himself, as proved by the plaintiffs, and admitted by the plaintiffs to be evidence in this cause, that he, the defendant, had been deceived by his employers, the owners and manufacturers of said oil, and that he sold the said oil to the plaintiffs under *such misapprehension. The defendant further gave in evidence, that the price of winter pressed oil begun to decline in March, 1822, and from the 19th of March, 1822, the price of such oil, by retail, fell to one dollar, and then eighty-seven and a half cents. The defendant then prayed the opinion of the Court, and their direction to the jury, that the plaintiffs cannot recover on the fourth count in their declaration, unless they shall prove a warranty on the part of the defendant, that the oil was winter pressed oil; and that in this case the description of the oil in the bill of parcels, does not amount to a warranty. Which opinion and direction the Court [HANSON and WARD, A. J., ARCHER, C. J. dissenting,] gave to the jury. The plaintiffs excepted.

2. The plaintiffs then prayed the opinion of the Court, and their direction to the jury, that the statement in the bill of parcels herein before set forth, that the oil therein mentioned was winter pressed oil, was a warranty in law that the said oil, at the time of the sale and delivery thereof to the plaintiffs by the defendant, in the manner herein before stated, was winter pressed oil. Which opinion and direction, the Court [ARCHER, dissenting] refused to give; and the plaintiffs excepted.

3. The plaintiffs further prayed the opinion of the Court, and their direction to the jury, that if the jury find from the evidence, that the oil mentioned in the bill of parcels, or a great part thereof, was not winter pressed oil at the time of the sale and delivery thereof by the defendant to the plaintiffs, as herein before stated, but was summer or fall oil, of inferior quality to winter pressed, and of less value, that then the plaintiffs are entitled to recover on the fourth count of the declaration filed in this case. Which opinion and direction the

Court [ARCHER dissenting,] refused to give; and the plaintiffs excepted.

4. The plaintiffs further prayed the opinion of the Court, and their direction to the jury, that if the jury find from the evidence, that at the time of the sale and delivery of the oil herein before mentioned, by the defendant to the plaintiffs, the defendant warranted the same to be winter pressed oil, and that the plaintiffs, relying on such warranty, purchased the * same; and if the jury also find, **510** that at the time of the said warranty and sale, the said oil was not winter pressed oil, but was summer or fall oil, and of inferior quality, and less value than winter pressed oil, that then the plaintiffs are entitled to recover. Which opinion and direction, the Court [ARCHER dissenting] did give to the jury; but also were of opinion, and so directed the jury, that there was no evidence in the cause of a warranty, and that the plaintiffs are not entitled to recover, unless they find from the evidence, that the oil was not winter pressed oil, and that the defendant, at the time of the sale, knew that the oil was not winter pressed oil. The plaintiffs excepted; and the verdict and judgment being against them, they appealed to this Court.

The cause was argued at June Term, 1827, before BUCHANAN, C. J., EARLE, STEPHEN, and DORSEY, JJ.

Williams, (District Attorney of U. S.) for the appellants, contended, 1. On the first and second bills of exceptions—That the statement in the bill of parcels that the oil therein mentioned was winter pressed oil, is a warranty in law, that the said oil, at the time of the sale and delivery thereof by the defendant to the plaintiffs, in the manner stated in the evidence, was winter pressed oil.

2. On the fourth bill of exceptions—That there was evidence of warranty that the oil in question was winter pressed oil. 1st. Because the bill of parcels contained such a warranty. 2d. Because if the bill of parcels did not *per se* import such a warranty, yet that, together with the declarations of the defendant, made at the time of the sale—the relation of the parties, and other circumstances, furnished evidence from which the jury might infer that there was such a warranty.

3. On the third bill of exceptions—That case is the proper form of action to recover for a loss sustained by a breach of such a warranty; and that the fourth count in the declaration is sufficient.

1. The whole question rests upon the fourth count in the declaration. A bill of parcels is a warranty, with certain exceptions, that the article therein mentioned is warranted to be of the quality described. 3 *Stark. Evid.* 1660, 1661, &c.; *Peake's Evid.* 228; **511** * *Long on Sales*, 120, 124; *Pasley vs. Freeman*, 3 *T. R.* 53; *Jones vs. Bowden*, 4 *Taunt.* 847; *Laing vs. Fidgeon*, 6 *Taunt.* 108, (1 *Serg. & Low*, 327;) *S. C.* 4 *Campb.* 169; *Yates vs. Pym*, 6 *Taunt.* 446, (1 *Serg. & Low.* 446; *Holcombe vs. Hewson*, 2 *Campb.* 391; *Tye vs. Finmore*, 3

Campb. 462; *Gardiner vs. Gray*, 4 *Campb.* 144, 145; *Bridge vs. Wain*, 1 *Stark. Rep.* 504, (2 *Serg. & Low.* 486;) *Shepherd vs. Kain*, 5 *Barn. & Ald.* 240, (7 *Serg. & Low.* 82;) *Defreeze vs. Trumper*, 1 *Johns.* 274; *Cramer vs. Bradshaw*, 10 *Johns.* 484; *Chapman vs. Murch*, 19 *Johns.* 290; *Roberts vs. Morgan*, 2 *Coican*, 438; *Bradford vs. Manly*, 13 *Mass.* 139. A written bill of parcels cannot be varied &c. by parol evidence. *Batturs vs. Sellers & Patterson*, 6 *H. & J.* 249. Here there is no ambiguity in the meaning, winter pressed oil, as stated in the bill of parcels. There can be no doubt as to whether it meant winter pressed oil or summer pressed oil. The defendant is to be considered in this transaction as principal, and he cannot shield himself under the suggestion of his having sold the oil in question as the agent of others. An agent may warrant so as to bind himself personally; and this the defendant has done in this case. 3 *Stark. Evid.* 1663; *Bradford vs. Manly*, 13 *Mass.* 143; *Jendwine vs. Slade*, 2 *Esp.* 572; *Baglehole vs. Walters*, 3 *Campb.* 154; *Pickering vs. Dowson*, 4 *Taunt.* 779; *Parkinson vs. Lee*, 2 *East*, 314; *Chapman vs. Murch*, 19 *Johns.* 290, (overruling *Seixas vs. Woods*, 2 *Caine's Rep.* 48;) 1 *Am. Quar. Review*, 121, by Mr. Hopkinson, a learned advocate of the Pennsylvania bar; *Snell, Stagg & Co. vs. Moses & Sons*, 1 *Johns.* 96; *Sands & Crump vs. Taylor & Lovett*, 5 *Johns.* 395; *Sweet vs. Colgate*, 20 *Johns.* 196.

2. Intention is always a matter of fact for the jury. 1 *Stark. Evid.* 428; 2 *Stark. Evid.* 741, 895; *Sugd.* 113; *Jones vs. Bowden*, 4 *Taunt.* 847; *Helyear vs. Hawke*, 5 *Esp.* 72; *Medina vs. Stoughton*, 1 *Salk.* 210; *Pasley vs. Freeman*, 3 *T. R.* 57; *Capp vs. Topham*, 6 *East*, 392; *Seixas vs. Woods*, 2 *Caine's Rep.* 48; *Jackson vs. Hull*, 10 *Johns.* 481; *Chapman vs. Murch*, 19 *Johns.* 290; *Sweet vs. Colgate*, 20 *Johns.* 196; *Etting*
512 *vs. Bank of United States*, 11 * *Wheat.* 59, 75; *Jolly's Adm'r's*
vs. Baltimore Equitable Society, &c. 1 *H. & G.* 295.

3. The fourth count in the declaration is according to the form in 2 *Chitty's Plead.* 100, (note,) 277, 278. It is wholly immaterial whether it be an action on the case, or an action of assumpsit. 3 *Blk. Com.* 166; 2 *Com. Cont.* 263; 3 *Stark. Evid.* 1660; 1 *Com. Dig. tit. Action on the Case*, (A 11,) 237, 238; *Pasley vs. Freeman*, 3 *T. R.* 58; *Pickering vs. Dowson*, 4 *Taunt.* 779; *Jones vs. Bowden*, *Ib.* 847; *Williamson vs. Allison*, 2 *East*, 446; *Govett vs. Radnidge*, 3 *East*, 62; *Richards vs. Simonds*, 3 *Wils.* 40; *Shepherd vs. Kain*, 5 *Barn. & Ald.* 240, (7 *Serg. & Low.* 82;) *Seixas vs. Woods*, 2 *Caine's Rep.* 48; *Barney vs. Dewey*, 13 *Johns.* 224; 1 *Chitty's Plead.* 39, 138; 2 *Blk. Com.* 451.

R. Johnson, for the appellee. The facts collected from the uncontradicted evidence in the cause—are, that the oil in question was manufactured at Nantucket, was there shipped in the fall of the year 1821 on board of the defendant's vessel, consigned to himself by the manufacturers, carried by him to Baltimore, and there sold by him as winter pressed oil, under an honest belief that it was such, as given in evidence by the plaintiffs, and as found by the verdict of

the jury. That at the time of the sale, the oil was opened to the inspection of the plaintiffs, and they, by their agents, did in fact superintend the gauging of it; and in making the sale the defendant acted only as the agent of the owners; and had no other opportunity of knowing the real condition of the oil, than the plaintiffs had, who purchased. He made use of no artifice to prevent the plaintiffs from ascertaining the condition of the oil. The sale was made on the 21st of November, 1821, and the oil was delivered between that day and the 5th of December following, on which last day the bill of parcels was signed and delivered. The evidence is, that the only difference between winter strained and other oil, is that the first is made in cold weather. The material is the same. The difference is only in the quality of the oil. In its capacity to stand a greater degree of cold, than the fall or summer oil. These, it is believed, are all the material facts which are necessary to be noticed in arguing the * questions of law. It has been admitted that the whole case turns upon the fourth count in the declaration. At the trial below four bills of exceptions were taken by the plaintiffs. The first question arises as well under the second and third bills of exceptions, as under the first; and it is—Is the description in the bill of parcels, that the oil therein mentioned was winter pressed oil, a warranty of itself? 2. Does not that description, taken in connection with the other facts given in evidence—such as the admissions of the defendant—the relative situation of the parties, &c. furnish evidence from which the jury might infer a warranty? This question arises upon the fourth bill of exceptions. 3. Is an action on the case a proper remedy to recover damages for the breach of any other warranty, than an express one, unless the plaintiff proves, as well as alleges, that such warranty was falsely and fraudulently made? Can it in any other way be maintained on an implied warranty? The Court below has not said that such an action cannot be sustained; on the contrary they directed the jury, in the fourth bill of exceptions, that if the defendant knew (to be found from the evidence,) the oil not to be winter pressed oil when he sold it, that then upon the whole case, the plaintiffs were entitled to recover.

1. As to the last question stated—can this action be maintained for the breach of any other than an express warranty, except by alleging and proving knowledge on the part of the defendant, and an intention to defraud, &c. 1 *Chitty's Plead.* 139; 2 *Chitty's Plead.* 100, (note,) 276, 324, (note;) *Williamson vs. Allison*, 2 *East*, 446; 2 *Selv. N. P.* 580; *Bridge vs. Wain*, 2 *Serg. & Low.* 486.

2. Is the representation in the bill of parcels itself a warranty that the oil sold was winter pressed oil? The word warranty is not to be found in the bill of parcels, nor does it contain express words of promise that the oil was winter pressed oil. It contains nothing more than a representation of the thing sold—an affirmation of that character. The general rule is admitted to be, that at common law

the maxim in the sale of property is *caveat emptor*. A sound price does not necessarily imply a sound article. *Co. Litt.* 102 *b*; 2 *Blk.*

514 *Com.* 451; *Johnson vs. Cope*, 3 *H. & J.* 89; *Parkinson * vs. Lee*, 2 *East*, 314; 2 *Com. Cont.* 265, 267, 272; 1 *Fonbl.* 120, 121, (*note x*;) 2 *Fonbl.* 280, (*note h*.) This rule is entirely independent of an opportunity to inspect, or an actual inspection. In *Johnston vs. Cope*, 3 *H. & J.* 89, there was no opportunity to inspect—the linens were sold in bales unopened, and the price paid was the price of merchantable linens. There could, therefore, have been no doubt that the purchaser intended to buy, and the vendor to sell merchantable linens. So in *Williamson vs. Allison*, 2 *East*, 448, (*notes*;) *Gray vs. Cox*, 10 *Serg. & Low.* 283. It does not depend, therefore, on the belief or expectation of the parties. But the purchaser may guard against this maxim by taking a warranty from the seller; and the question here is, have the plaintiffs done so by taking the bill of parcels? Does the seller by that bill of parcels warrant the oil to be winter pressed oil? It may be, and is admitted that no particular forms of words are necessary to make a warranty. The word warranty need not be used—any word of equivalent import is sufficient. The price paid is not sufficient, under the authorities cited, to authorize the inference that the parties intended a warranty; nor is the purpose for which the oil was to be used, and the understanding and usage of the trade in that particular, sufficient. That usage cannot control the general law. *Thompson vs. Ashton*, 14 *Johns.* 316; 1 *Selw. N. P.* 482; *Parkinson vs. Lee*, 2 *East*, 314; *Bridge vs. Wain*, 2 *Serg. & Low.* 486. There is nothing left upon the bill of parcels but the statement that the thing sold was winter pressed oil, and that statement being nothing more than an affirmation of the fact. Before this Court can decide that it is a warranty, they must decide that an affirmation is in all cases a warranty, and is of itself, and considered by itself, equivalent to the word warranty. There is no distinction between a difference in the thing, or in its quality. 1 *Fonb.* 120, (*note x*.) Is then an affirmation *per se*, a warranty? 2 *Com. Cont.* 265; *Chandelor vs. Lopus*, *Cro. Jac.* 4; 1 *Selw. N. P.* 486; 2 *Com. Cont.* 265; *Co. Litt.* 102 *b*; 1 *Com. Dig.* 238; *Seixas vs. Woods*, 2 *Caine's Rep.* 48; *Sicett vs. Colgate*, 20 *Johns.* 203; *Pasley vs. Freeman*, 3 *T. R.* 53, per Buller, J. The intention to warrant is not to

515 be inferred from the intention to sell. It depends upon * the intention with which the sale is made, and that intention is to be collected from the circumstances of the case, and to be proved by the plaintiff. *Jendicine vs. Slade*, 2 *Esp.* 572; *Chapman vs. Murch*, 19 *Johns.* 290; 2 *Com. Cont.* 272; 12 *Vin. Ab. tit. Evidence*, (6 E.) *pl.* 7. The cases show that the party did something more than affirm the fact. If it were otherwise an affirmation would in all cases be a warranty. 2 *Blk. Com.* 451; 3 *Blk. Com.* 166; *Am. Reg.* 122. There can be no difference in a representation of this sort in parol, and in writing. But the case of *Tye vs. Finmore*, 3 *Campb.* 462, and

Gardiner vs. Gray, 4 *Campb.* 145, have been much relied on by the learned counsel on the other side. Unless the last case is founded on the idea that the common law maxim of *caveat emptor* does not apply where the party has no opportunity to inspect the commodity; or that the parties, under the circumstances of that case, intended only waste silk which was merchantable, then is the case clearly wrong. The mere fact of the article not being merchantable, is not sufficient, as appears by *Parkinson vs. Lee*, 2 *East*, 314, and *Le Neuville vs. Nourse*, 3 *Campb.* 350; *Holden vs. Dakin*, 4 *Johns.* 421; *Gray vs. Cox*, 10 *Serg. & Low.* 283.

Wirt, (Attorney-General of U. S.) on the same side. The contract of sale in general did not come into view in this case. It is not whether the plaintiffs might not maintain assumpsit on an implied warranty. But whether they can maintain this action on the case sounding in deceit—charging a fraudulent and deceitful warranty. Every count in the declaration is for deceit—the same as if they had stated that the defendant knowing at the time the representation to be false. The word used charged the *scienter*, in express terms. *Bayard vs. Malcolm*, 1 *Johns.* 453; 2 *Chitty's Plead.* 311, 318, (note a;) *Craft vs. Boite*, 1 *Saund.* 242; *Harman vs. Tappenden*, 1 *East*, 563; *Williamson vs. Allison*, 2 *East*, 446. Where the party is charged with deceit and fraud, it must be proved. 2 *Chitty's Plead.* 316, (note u.) Upon an express warranty, the *scienter* need not be alleged or proved. But it is otherwise in the case of an implied warranty. 2 *Selw. N. P.* 580, 582, (note 2.) Where the word warranty is used in the books, it means * express warranty. 1 *Chitty's Plead.* 140, (note l;) 2 *Chitty's Plead.* 136, (note r.) The Court **516** below meant an express warranty. They say, in the fourth bill of exceptions, that if it was an express warranty, then the plaintiffs could recover, but that there was no evidence of an express warranty; and the plaintiffs could not recover unless the jury find that the oil was not winter pressed oil, and that the defendant knew it was not. *Shepherd vs. Kain*, 7 *Serg. & Low.* 82, though not fully reported, is a decision on the very case before this Court. The bill of parcels is no evidence of an express warranty. A name given to an article in a bill of parcels is not an express warranty. It only amounts to an implied warranty. Parol evidence is not admissible to invalidate a bill of parcels. Who is to expound it? The Court. The opinion of the Court below is correct according to the declaration, the evidence and the law. There must be wilful deceit, &c. 2 *Dain's Ab.* 560, s. 16. Where the warranty goes to the quality of the article sold, it must be an express warranty, or a deceit. 2 *Com. Cont.* 265. If this is a warranty, it goes to the quality of the article, and the plaintiffs cannot recover unless the warranty is an express warranty. *Pasley vs. Freeman*, 3 *T. R.* 57; *Big. Dig. tit. Sale*, (B) 536, 537, pl. 1, 4.

Taney, in reply. What was the plaintiffs' cause of action, and what their rights to be enforced in a Court of justice? This arises

under the first and second bills of exceptions. Is the statement in the bill of parcels a warranty or not? If it is an express warranty, the Court below erred in their opinion in the first bill of exceptions; but if it is an implied warranty, then the Court erred in their opinion in the second bill of exceptions. The bill of parcels was a warranty—whether express or implied is immaterial. What is a warranty? It is a contract that a thing sold shall answer a particular quality. As for instance, that a horse shall be sound—that a particular thing or article shall be of a particular quality. If the defendant contracted to deliver winter pressed oil—if he engaged to do so, it is enough. No parol evidence can be offered to change the contract as stated in the bill of parcels. *Batturs vs. Sellers & Patterson*, 6 H. & J. 249. The defendant affirmed * in this bill of parcels, **517** that he sold to the plaintiffs winter pressed oil. Every affirmation is a warranty, but there are exceptions as if it be the mere expression of an opinion. *Peake's Evid.* 228; *Chapman vs. Murch*, 19 Johns. 290; *Long on Sales*, 120, 124; 3 *Stark. Evid.* 1660 to 1663; *Roberts vs. Morgan*, 2 Cowen, 438; *Pasley vs. Freeman*, 3 T. R. 57. The statement in the bill of parcels is an averment or declaration that the fact is as stated. It is a contract in relation to the article or thing delivered. It was an undertaking that the oil sold was winter pressed oil agreeably to the description given of it—an agreement that it should answer, as stated in the bill of parcels. *Jones vs. Bowden*, 4 Taunt. 847; *Yates vs. Pym*, 1 Serg. & Low. 446; *Tye vs. Finmore*, 3 Campb. 462; *Gardiner vs. Gray*, 4 Campb. 144; *Bridge vs. Wain*, 2 Serg. & Low. 486; *Shepherd vs. Kain*, 7 Serg. & Low. 82; *Laing vs. Fidgeon*, 1 Serg. & Low. 327. In *Chandelor vs. Lopus*, Cro. Jac. 4, the point decided is law, although the dicta is not law. The cases cited from the *New York Reports* are in conflict with the English decisions. Which are to be regarded as the soundest law? The New York Courts let in parol evidence to prove the intention of the parties to a bill of parcels. This Court refused to do so in *Batturs vs. Sellers & Patterson*, 6 H. & J. 249.

The prayer in the third bill of exceptions assumes the bill of parcels to be a warranty. There was no distinction taken in the Court below between an express and an implied warranty. It is now resorted to for the first time. Assumpsit or case will lie on an express warranty; and the fourth count is a good one on an express warranty; and it would be so in assumpsit. Upon an implied warranty, assumpsit will lie. But it has been urged that this is an implied warranty, and the plaintiffs cannot recover on the fourth count. There are different classes of implied warranties. But this is an express warranty, and must be treated as such. Implied warranties arise from the fraud or contract of the party. 3 *Stark. Evid.* 1660 to 1663; 2 *Com. Cont.* 267, 270; *Tye vs. Finmore*, 3 *Campb.* 462; 2 *Chitty's Plead.* 277. It is not denied that case will lie on an implied warranty. 3 *Blk. Com.* 166; 2 *Com. Cont.* 263; 1 *Fonbl.* 120, (note z;)

2 Chitty's Plead. * 278; Bayard vs. Malcolm, 1 Johns. 453; 3 Stark. Evid. 1660.

Curia adv. vult.

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DORSEY, J. delivered the opinion of the Court. Three questions have been argued in this cause. The first (presented by the 1st, 2d and 3d exceptions) is, whether the statement in the bill of parcels, that the oil therein mentioned was winter pressed, be a warranty of that fact? The second, (arising on the 4th exception,) is, whether upon the whole proof permitted to go to the jury, the County Court erred in instructing them, that there was no evidence that the oil was warranted winter pressed? The third question (involved both in the third and fourth exceptions,) is, can the appellants, having sued in case, and charged fraud and deceit, recover without proof of a *scienter*?

It was not denied in the argument, that after verdict the allegation of fraud and deceit in the declaration is equivalent to the charge of an actual *scienter*; and it was admitted, that if in this case there be an express warranty that the oil was winter pressed, then the averment of fraud and deceit is immaterial, and need not be proved.

Warranties on the sales of personal property have usually been divided into two classes, express and implied. To create an express warranty, the word "warrant" need not be used; nor is any precise form of expression required. Any affirmation of the quality or condition of the thing sold, (not uttered as matter of opinion or belief,) made by the seller at the time of sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase; if so received and relied on by the purchaser, is an express warranty. And in cases of oral contracts on the existence of these necessary ingredients to such a warranty, it is the province of the jury to decide, upon considering all the circumstances attending the transaction. But of written contracts, the Court are the expositors. Whether the instrument contain an express warranty or not, they must determine; not leave the question to be inferred by a jury from a consideration of facts *aliunde*.

* Implied warranties arise by operation of law; they exist without any intention of the seller to create them; and may properly be divided into two kinds. The one untinged by actual fraud or deceit; as the warranty of title; warranty that provisions purchased for domestic use are wholesome; and the warranty in executory contracts, or where the purchaser had no opportunity of inspection, that the article contracted for shall be saleable as such in the market. The other kind of implied warranties are those where fraud and deceit are of their very essence; without which they do not exist; as in cases where the seller of any article, knowing of its unsoundness, uses any disguise or artifice to conceal it, or represents it, (whether in the way of expressing opinion or belief, or otherwise,) to be exempt from such defect. Implied warranties are not

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conclusions or inferences of fact drawn by a jury; but they are the conclusions or inferences of law, pronounced by the Court, upon facts admitted or proved before the jury. If the facts be controverted, the Court hypothetically instruct the jury, that if they find such and such facts, then there is an implied warranty, and their verdict must be given accordingly; but if they do not find those facts then there is no implied warranty. Where an inquiry, therefore, is submitted to a jury, whether an affirmation or statement, made by the seller, of the quality of an article sold, be a warranty or not, the question would be, not whether it be an implied but an express warranty? Had the Court below permitted this case to go to the jury to determine whether, upon the whole testimony offered, the oil was winter pressed oil, the question of express warranty only could have been the subject of their inquiry. The attempt therefore, by the appellee's counsel, to sustain the opinion of the County Court, on the ground that the present action depends on an implied warranty, if these positions be correct, cannot avail them.

In support of the doctrine likewise insisted on, that conceding this to be an implied warranty, on which an action on the case could be sustained, without any allegation of fraud, yet, that fraud being charged must be proved, no case of acknowledged authority has been produced. The passages relied on to establish it in *Selwyn's Nisi Prius*, p. 482, 3, tit. *Deceit*, * are mere statements of the principles decided in *Dale's Case*, Cro. Eliz. 44; *Springwell vs. Allen*, Aleyn, 91; *Chandelor & Lopus*, Cro. Jac. 4. The only point adjudged in the two former of these cases is, that he who sells a chattel without title, is not answerable to the purchaser, (from whom the property is recovered by the rightful owner,) unless he made an express warranty, or knew of the defect of his title. And the only point settled by the last case, except that in pleading affirmation of a fact, does not mean a warranty thereof, is, that if the seller of a horse, knowing him to be unsound, affirm to the buyer that he is sound; or if the owner of a stone of no real value, knowing it to be such, sell it to a person unskilled in such articles, as a diamond of great value, and affirm it so to be; that no action lies against him by the purchaser whom he has defrauded; and that it is the same thing whether he knew his affirmations to be false, or believed them to be true. It is unnecessary to say, that these decisions are at war with the settled axioms of the law, as recognized in all modern cases and writers on the subject. In an action on the case, upon an express warranty, fraud and deceit, though alleged, need not be proved, because the allegation is immaterial, the action being sustainable without it. The same reason will produce the same consequence in all actions on the case on implied warranties, where the *scienter* is not an essential ingredient of the right of action. This view of the subject accords with that found in *Long on Sales*, 120; where in treating of warranties in sales of personal property, it is stated

"some warranties are implied by law without any particular stipulation between the parties. Thus the seller is always understood to undertake that the commodity he sells is his own; and if it prove otherwise, an action on the case, in the nature of deceit, lies against him to exact damages for this deceit. In contracts for provisions, it is always implied that they are wholesome, and if they be not, the same remedy may be had." Yet in either of those cases the seller is liable, though ignorant of the defect. But if sued, as directed, "in nature of deceit," where the *scienter* or fraud and deceit are always alleged, no recovery can be had, according to the doctrine contended for, without proof of actual fraud. In such cases the fraud and deceit are intendments * of law, not matters of fact necessary to be proved. As was justly observed by C. J. Ander- **521**
son, who dissented from the other Judges in *Dale's Case*—"it shall be intended, that he that sold had knowledge whether they were his goods or not." It hence follows that the opinion of the County Court cannot be supported on the principle urged in the argument of the third question.

Whether the statement, in the bill of parcels, that the oil was "winter pressed," be *per se* a warranty of that fact, is a question of more difficulty. In oral contracts much of the *colloquium* was never intended or understood by the parties to be essential component parts of the contract. But in written agreements nothing is inserted which is immaterial; no fact stated which is not presumed to be relied on by the parties, and for the truth of which the one does not bind himself to the other. Upon this principle it is, that mere recitals in deeds have been held to be covenants; upon this ground must rest the decision, that the action of covenant could be supported in *Cræmer vs. Bradshaw*, 10 *Johns.* 484. There the plaintiff declared on a bill of sale, by which the defendant, in consideration of \$175, bargained and sold to the plaintiff "a negro woman slave, named Sarah, aged about thirty years, being of sound wind and limb, free from all disease." And the defendant in due form, in the covenanting part of the instrument, (omitting every thing as to age or soundness,) covenanted only to warrant and defend the slave, so sold to the plaintiff, against the defendant, and all other persons. The alleged breach was, that the slave was unsound, and affected with divers diseases, &c. *Per curiam* the words in the bill of sale, "being of sound wind and limb, and free from all diseases," are an averment of a fact, and import an agreement to that effect. The words were not used as a mere description of the slave; they amount to an express, not an implied warranty; to a warranty of the soundness of the slave. The plaintiff is therefore entitled to judgment.

If the bill of parcels be considered as the written contract between the parties, the statement therein that the oil was "winter pressed," could not be considered as mere matter of description, or of opinion

522 or belief of the seller; but as the * averment of a material fact, of which he has taken to himself the knowledge, and the existence of which he warrants. This Court, however, has never decided, that the bill of parcels is the written contract; nor is it designed at this time to express any opinion upon that subject, but in *Batturs vs. Sellers & Patterson*, 5 H. & J. 117, and 6 H. & J. 249, this Court did decide that the bill of parcels in that case was written evidence of the contract; and could not be added to, or varied by, oral testimony. It follows as a necessary consequence, that, if the bill of parcels be "the written evidence of the contract," the terms and expressions thereof must receive the same construction that would be given them if expounded from the written agreement itself; where calling it "winter pressed oil," would be a warranty that it was such.

Upon English authorities, independently of any decisions in this State, it would appear, that a statement in a bill of parcels, or any similar instrument, of the quality of an article sold, is a warranty thereof. In *Yates vs. Pym*, 6 Taunt. 446, an action upon a sale note, (an instrument of no greater solemnity or obligation than a bill of parcels,) "of 58 bales of prime singed bacon," on account of a taint in some of it, Justice Heath decided "that the contract amounted to a warranty that it was prime singed bacon, and being in writing could not be added to by parol evidence." And on motion to set aside the verdict, the opinion of the learned Judge was sustained by the Court of Common Pleas. In *Shepherd vs. Kain*, 5 Barn. & Ald. 249, an action on the case for breach of warranty; the only evidence of which was the advertisement of a vessel as "copper fastened;" yet sold with all faults; upon proof that she was only partially copper-fastened, Best, J. determined that the plaintiff was entitled to recover; and this opinion was affirmed in the Court of King's Bench. These are cases in which was recognized an express warranty of quality, from the mere statement thereof in the sale note or advertisement.

As establishing a contrary doctrine, has been cited for the appellee, the case of *Jendwine vs. Slade*, a *nisi prius* decision of Lord Kenyon, in 2 Esp. Rep. 572. The action was brought to recover damages on the sale of two pictures, sold under a catalogue, wherein the names of the artists, who had been dead * some centuries, were placed **523** opposite to the pictures; the ground of action being, that the pictures were not the works of those artists, of which, it was alleged, the catalogue was a warranty. Lord Kenyon said, "it was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back; and there being no way of tracing the picture itself, it could only be the matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That in the opinion of the seller the picture is the work of the artist, whose name

he has affixed to it." Looking only to the facts in the case of *Jendwine vs. Slade*, and the decision of the Judge upon them, it might perhaps be considered as entitled to all the weight in favor of the appellee, which his counsel have ascribed to it. But when the explanation and grounds of the opinion, as given by the Judge himself, are adverted to, their only application to the case at bar, is to recognize the plaintiff's right to recover. He states that it is impossible to make, putting the name of the artist in the catalogue opposite the picture, a warranty; because it was the work of an artist some centuries back; and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist to whom it was imputed, or not. Suppose, instead of an ancient, it had been a picture of recent execution; what then, by necessary inference, would have been the opinion of the learned Judge? Why, as there did exist a mode "of tracing the picture itself," therefore, by placing the name of the artist in the catalogue, opposite the picture, is not a mere expression of the opinion of the seller, but a warranty of the fact. The oil in controversy is no article of antiquity; it was manufactured but a short time before in Nantucket, where Lewis resided, and whence he brought it to Baltimore, and sold it as his own. Without great inconsistency and abandonment of his own reasoning, Lord Kenyon, who decided *Jendwine vs. Slade*, could not do otherwise than determine, that the statement in the bill of parcels that the oil was "winter pressed" was a warranty thereof.

As a general proposition, it is true, that in sales of personal property the seller is not answerable for any defects in the * quality or condition of the article sold, without an express warranty **524** or fraud. But the universality of this rule is qualified by many exceptions, much more inconsistent with it than the principle on which the appellants here rest their right to recover. As if a manufacturer contract to furnish goods at a stipulated (even though it be a reduced) price, there is an implied warranty that the goods delivered be of merchantable quality. To this effect is the case of *Laing vs. Fidgeon*, 6 Taunt. 108. So also, if the buyer had no opportunity of ascertaining by inspection, the quality of the article, there is an implied warranty that it be saleable in the market, under the denomination by which it was sold. Such are the cases of *Gardiner vs. Gray*, 4 Campb. 144, and *Bridge vs. Wain*, 1 Stark. 504. It is not sufficient, that the article delivered, abstractedly bear the name of that contracted for; it must do more; there is an implied warranty, that it be of that quality which a commodity of that name must possess to be saleable in the market. Nay, such is the disposition of Courts of justice to ingraft exceptions upon this general rule of law, that in *Gray and another vs. Cox and others*, in 4 Barn. & Cres. 108, Abbott, C. J. decided "that the defendants, having sold the copper to be applied to a specific purpose, and having received for it the

market price of the day, must in law be considered as warranting it to be reasonably fit for that purpose. And the same doctrine was previously avowed in *Bluett vs. Osborne and another*, 1 Stark. 384, by Lord Ellenborough, who stated, that “a person who sells, impliedly warrants that the thing sold shall answer the purpose for which it was sold.”

The cases of *Seixas vs. Woods*, 2 Caine's Rep. 48, and *Swett vs. Colgate*, 20 Johns. 196, have been mainly relied on for the appellee; and it must be admitted, that upon the principles on which they are professedly decided, it is not possible to reconcile them with the decisions in England, which have been referred to. Regarding the facts only of these New York cases, it might perhaps be urged, (but whether upon sustainable ground or not, we mean to intimate no opinion,) that they differ from the case at bar in this; here the statement relied on as a warranty, is of the quality of the thing sold, viz. that

525 it was “winter pressed;” there the question was, whether the * selling an article as Braziletto or Barilla, creates an implied warranty, that it be that for which it is sold. The Court there, however, have placed their opinions upon no such distinction; but have broadly determined, that the shewing by the seller to the purchaser, of the invoice representing the quality, the advertisement of sale, and bill of parcels delivered to the buyer, all representing the same fact, are no evidence of a warranty (either express or implied,) of the quality of the article sold. Justices Thompson and Kent, by whom *Seixas vs. Woods* was decided, (Lewis, C. J. having dissented,) appear mainly to found their opinion upon the two old cases of *Chandler vs. Lopus*, and *Springwell vs. Allen*; to the former of which they are made by the reporter to give an entirely new version. They state the decision of the Court to have been, that an action of trespass would not lie for selling a jewel, affirming it to be a Bezar stone, when in truth it was not, unless the defendant knew it not to be Bezar stone, or had warranted it to be such. The Court in that case made no such decision. They held the declaration to be ill, “for as much as no warranty is alleged,” (the *narr.* having only stated, that the goldsmith “affirmed to Lopus that the stone was a Bezar stone.”) And so far from intimating an opinion that the action could have been sustained, if the goldsmith had known the stone not to be a Bezar stone, they expressly state, that “although he knew it to be no Bezar stone, it is not material; for every one, in selling his wares, will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action.” As to *Springwell vs. Allen*, it professes to settle precisely the same question which arose in *Dale's Case*; that no action would lie against a man selling the horse of another, which he believed to be his own. Many other cases are relied on, in *Seixas vs. Woods*, some of which are applicable to sales of real property only; and in none of them can aught be found further sustaining the opinion there

pronounced, or more strongly militating against that now given, than the general rule before laid down, that in sales of personal property no warranty of quality is implied.

The case of *Sweett vs. Colegate*, 20 Johns. 196, is in fact, a mere reiteration of what was decided in *Seixas vs. Woods*. * The weight of the authority of *Seixas vs. Woods*, (and consequently **526** of *Sweett vs. Colegate*,) is however somewhat shaken by that distinguished jurist the late Chancellor Kent, by whom it was decided. In his *Commentaries*, vol. the 2nd, page 274—5, after ample time for the most thorough investigation and mature deliberation upon the subject, when treating “of the implied warranty of the articles sold,” he says, “in *Seixas vs. Woods*, the rule was examined and declared to be, that if there was no express warranty by the seller, or fraud on his part, the buyer who examines the article himself, must abide by all losses arising from latent defects equally unknown to both parties; and the same rule was again declared in *Sweett vs. Colegate*. There is no doubt of the general rule of law as laid down in *Seixas vs. Woods*; and the only doubt is whether it was well applied in that case, where there was a description in writing of the article by the vendor which proved not to be correct, and from which a warranty might have been inferred.” But yield to those cases (what we think them by no means entitled to) the full effect of establishing the universality of the rule, without an exception, that nothing but an express warranty or fraud will enable a purchaser to obtain an indemnity for a defect of quality in the thing purchased, the case before us stands unaffected by it. The statement in the bill of parcels that the oil was “winter pressed” is regarded as an express warranty; and under the decision in *Batturs vs. Sellers & Patterson*, 6 H. & J. 249, the Court and not the jury, is the tribunal so to declare it. The opinions of the County Court, therefore, in none of the exceptions, can be sustained.

But suppose the bill of parcels is not to be construed in the same manner that a written agreement between the parties should be, and is to be regarded as a mere receipt, and that, notwithstanding the case of *Batturs vs. Sellers & Patterson*, 6 H. & J. 249, parole evidence might be offered to prove the contract—is it possible that a jury could attach less weight to the written statement in the bill of parcels than they would do to Lewis’ verbal affirmation of the same fact; which affirmation is an express warranty if so intended to be; of which intention in oral contracts the jury only are competent to judge. Adverting then to some of the leading facts in proof * by the appellants, that they for the first time, were about to become **527** dealers in sperm oil; that “winter pressed” was of nearly double the value of summer pressed oil; that the price paid was that of winter pressed oil; that such was the temperature of the weather at the time of sale, that the most experienced dealers in the article could not distinguish the one from the other, but by the aid of chemical

experiments by men of science; that in the bill of parcels it was denominated “winter pressed” oil; and that the appellee had admitted that he had sold it for the best winter pressed oil, and that it was not, what he had sold it for; can the instruction given to the jury (as stated in the 4th exception,) that there was no evidence of a warranty be for one moment sustained? Would it have been an unreasonable inference from the facts to be drawn by the jury, that in the verbal contract the appellants required and received a warranty of quality? Upon what other ground can its insertion in the bill of parcels be accounted for?

It matters not that this testimony be contradicted, its force impaired by the proof adduced on the part of the appellee; in such circumstances it is the jury, not the Court, who are to decide.

Dissenting from the opinions of the County Court, on all the exceptions, let their *Judgment be reversed, and a procedendo awarded.*

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ACTION.

1. In an action by a physician to recover compensation for his professional services, the defendant cannot avail himself of the provisions of the Act of 1821, ch. 217, unless the notice required by that Act had been given. *Berry vs. Scott*, 72.
2. The Act of 1821, ch. 217, which declares, "that from and after the passage of this Act, no person or persons not authorized to practise medicine and surgery by the laws of this State shall have power to recover any fees or other remuneration for medicine given or disposed of, or for any services rendered or performed in the practice of medicine or surgery or both, provided that the defendant shall give ten days notice to the plaintiff or his attorney, that he intends to dispute the claim," embraces all cases, where the attempt to recover was subsequent to its passage. *Ib.*
3. An action of debt for an escape can be maintained against a sheriff, who having arrested a defendant on a *capias ad satisfaciendum*, permitted him to go at large until the return day of the writ, although the sheriff then brought the defendant into Court. *Koones vs. Maddox*, 83.
4. S. assigned his entire stock of goods to E. but retained possession of it, went on with his business as usual, and made purchases from J. which when received into his store, were placed among the merchandise assigned to E. After some time S. failed, and E. took possession of all the goods in his store, (among which were some of the articles received from J.) sold them, and applied the proceeds to the payment of a debt due him by S. and of endorsements made by him for S. In an action by J. against E. for the goods sold and delivered to S.—*Held*, that there was no evidence from which the jury might infer a partnership, an agency or fraud between E. and S. so as to make E. liable. *Smith vs. Edwards*, 306.

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APPEAL AND ERROR.

1. Where the subject decided by the inferior Court is left by law to their discretion, as in the refusal to grant a new trial, it has been adjudged that a writ of error will not lie. *Wall vs. Wall*, 61.
2. Where a Court has established rules for its government and that of suitors, fixing days for the filing of pleading, and where the long established practice of the Courts require special pleas to be drawn up and filed at length, there exists no discretion in the inferior Court to dispense at pleasure with their own rules, or to innovate upon such established practice; and a party injured by such a course has an undoubted right to seek redress in an Appellate Court. *Ib.*
3. Where a defendant pleaded payment, and limitations, on which pleas issues were joined, and the jury found for the plaintiff on the first issue, and for the defendant on the second, the Appellate Court, having determined that the County Court erred in receiving the plea of limitations, reversed the judgment which that Court had rendered for the defendant, and gave judgment for the plaintiff. *Ib.*
4. An appeal will lie for the party aggrieved by the decision of a motion to set aside an execution. *Hollingsworth vs. Floyd*, 67.
5. Where an execution is properly issued for a part of the sum for which it is laid it is error for the Court to quash it altogether. *Ib.*
6. An appeal from the order of the Chancellor dissolving an injunction will not lie. It is an abuse of the right of appeal, and will be censured accordingly. *Dorsey vs. Smith*, 101.
7. A final decree, or a decretal order passed by the Court of Chancery, or the County Court as a Court of equity, from which an appeal might have been taken within a limited period, after the expiration of such period, in the further progress of the cause in which it was pronounced, and in the absence of any other ground of error than what the prior proceedings themselves disclosed, will be considered as conclusive upon the rights of the parties, as well in the Court of original jurisdiction, in which further proceedings were necessary to carry such decree, or order, into execution, as in the Appellate Court to which the case was ultimately carried. *Strike vs. McDonald*, 142.
8. A decretal order should be appealed from within nine months from the time of making it by the terms of the Act of 1785, ch. 72, s. 27. *Ib.*
9. The right of appeal from a decretal order of the Court of Chancery is not a permissive privilege to be exercised or not in the election of the party, and postponed at his pleasure until the final decree. *Ib.*

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APPRENTICE.

1. In an action for harboring an apprentice, to entitle the plaintiff to recover, he must allege the tenor, or substance, and legal effect of the indenture of apprenticeship. *Ferguson vs. Tucker*, 136.
2. Where a plaintiff, in attempting to conform to this requisition, averred, "that H. then and from thence hitherto," (that is, until the date of issuing the writ,) was his apprentice, his statement is falsified by proof, which showed that the contract of apprenticeship had ended prior to that time; and those words being of the very substance of the contract declared on, could not be rejected as surplusage, and, therefore, he could not recover. *Ib.*
3. In such action a knowledge of the apprenticeship by the defendant, is an indispensable requisite to recovery. *Ib.*
4. Although at the time of hiring an apprentice, a defendant may have been ignorant of the apprenticeship: yet if after obtaining that information he continues to harbor him, he is liable to an action at the suit of the master, without any proof of either a demand or refusal. *Ib.*
5. As soon as the new master acquires a knowledge of the apprenticeship, he is bound to discharge the apprentice, that he may not hold out to him an inducement not to return to his original master. *Ib.*

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ARBITRATION AND AWARD.

1. Awards are certainly not treated as strictly now as they formerly were; they are looked at with a more favorable eye, and more liberally construed; they still, however, must possess the fundamental properties of an award. Among other things, they are required to be within the submission—certain to a common intent, and final. *Archer vs. Williamson*, 48.
2. The rule in relation to the construction of awards is, that presumptions are not to be raised for the purpose of overthrowing them; but that they are to be liberally construed, so as to give effect and operation to the intention of the arbitrators where it can be done. and that every reasonable intendment is to be made in their support. *Ib.*
3. Arbitrators cannot reserve to themselves the authority to act judicially upon the subject submitted, after their powers are put an end to by making the award; neither can they delegate to another any part of their judicial authority, which is personal to themselves. nor refer to another, the decision of a point on which they find a difficulty to decide themselves, and much less to the parties to the submission, or either of them. *Ib.*
4. The reservation or delegation in an award of a power over the thing submitted, shows the award not to be final, and consequently void; unless indeed, it relates only to some merely ministerial act. *Ib.*
5. Where the subject referred was one undivided matter, specifically brought to the notice of the arbitrators, on which they professed to act, and the purpose of the parties was to have a final determination of the whole matter submitted, an award comprehending a part only of the matter submitted, was held to be void. *Ib.*

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1. One partner cannot maintain an action against his copartners, for work and labor done on account of the partnership. *Causten vs. Burke*, 217.
2. With respect to debts for work and labor, or other personal services, it is a rule that however special the agreement was, yet if it was not under seal, and the terms of it have been performed on the plaintiff's part, and the remuneration was to be in money, it is not necessary to declare specially, and the common *indebitatus* count is sufficient. *Per* STEPHEN, J. *Ib.*

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BANKRUPTCY AND INSOLVENCY.

1. The provisional trustee of an insolvent debtor, appointed under the Act of 1816, ch. 221, is the mere recipient of the property of the insolvent, which the law contemplates his obtaining immediate possession of from the insolvent himself, and not by suit against a third person. *Brown vs. Brice*, 19.
2. Such a trustee is not authorized to assign the insolvent's judgments; and where one purchased such a judgment from that trustee, and collected the same, he is answerable for the amount received by him, to the permanent trustee, in an action for money had and received. *Ib.*

BILL OF EXCEPTIONS.

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BOND.

1. In an action of debt on a bond with a collateral condition, in which there were no pleadings but the declaration, the parties filed an agreement designed to supply their place, which was so defective as to be wholly insufficient for that purpose. The jury rendered a verdict for the plaintiff, and the County Court entered judgment in conformity. On appeal the judgment was reversed, and a *procedo* awarded. *Laiuller vs. State*, 202.

BOND.—*Continued.*

2. To sustain a judgment on such a bond, obtained on verdict, by default, on *nil dicit*, a case stated or by confession, not ascertaining the sum on payment of which the penalty of the bond is to be released, the replication must set out a cause of action: or it must appear on the roll, with sufficient certainty, by way of assignment of breaches. *Ib.*
3. In a suit by a creditor upon a testamentary bond, the proceedings should disclose a compliance with the Act of 1720, ch. 24. *Ib.*
4. B. as administrator *de bonis non*, with R. and W. as his sureties, by order of the Orphans' Court in 1806, entered into a joint administration bond. W. died in 1810, and R. in 1814. After the death of W. judgments were obtained on this bond against B., and R. the surviving surety, on account of which large payments were made by R., the principal being insolvent. The real estate of W. after his death, being sold by decree of a Court of equity, for the payment of his debts—on the petition of the representatives of R. claiming to recover contribution, for the payments made by him, out of such proceeds—*Held*, that they were not entitled to recover. *Waters vs. Riley*, 223.
5. In the case of a joint bond, the remedy at law survives against the surviving obligor, and is lost, as against the representatives of him who first dies. *Ib.*
6. Where the Legislature prescribes the substance of a bond, and it is so drawn as to include every obligation imposed by the law, and to afford every defence given by it, it will be sufficient, notwithstanding it may be slightly variant from the literal form set out. *Per ARCHER, J.* *Ib.*
7. R. as the executor of T. entered into a testamentary bond on his estate. Upon the death of R. letters of administration *de bonis non* were granted to B. In an action on the bond executed by R. brought against his administratrix, to recover the distributive shares due to certain legatees under the will of T., *held*, that the action could not be sustained. *State vs. Hanson*, 325.

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Inadequacy of consideration alone, untinctured by fraud or circumvention, is not a sufficient ground to vacate a contract otherwise regular. *Stewart vs. State*, 87.

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PARTNERSHIP, 1.

CONTRACT.

There is a distinction between oral and written contracts, that in the former much of the *colloquium* was never intended or understood by the parties to be essential component parts of the contract, while in the latter nothing is inserted which is immaterial, no fact stated which is not presumed to be relied upon by the parties, and for the truth of which the one does not bind himself to the other; upon this principle mere recitals in deeds have been held to be covenants. *Osgood vs. Lewis*, 363.

See APPRENTICE, 2.

ASSUMPSIT, 2.

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PLEADING, 19, 20.

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See PLEADING, 10.

COURTS.

The enlargement of the equity jurisdiction of the County Courts gave them powers concurrent with those of the Court of Chancery, and necessarily took with it all the laws and regulations relating to equity matters in that high tribunal. *Strike vs. M'Donald*, 142.

COVENANT.

Where D. by deed bargained and sold a tract of land to B. and covenanted to warrant and defend the same against the lawful claim of all persons, and M., the widow of one who was seized of the land before D., being entitled to dower at law, brought her action of dower against B. who confessed judgment, and then filed a bill in equity and obtained an injunction against her, which bill at the final hearing was dismissed, and M. had execution for and assignment of her dower out of the warranted premises. In an action by B. against D. on his warranty—*Held*, that under the circumstances B. was not bound to prosecute an appeal either from the legal or equitable proceedings. *Dimond vs. Billingslea*, 195.

See CONTRACT.

CRIMINAL LAW.

1. In an indictment founded upon the Act of 1809, ch. 138, for stealing a bank note, it is sufficient to describe the note as a bank note for the payment of, &c. and of the value of, &c. Nothing more is required than to charge the offence in the language of the Act. *State vs. Cassel*, 303.
2. Where an indictment is founded upon a single statute, and not upon any other in conjunction with it, it is clear that its conclusion must be in the singular. *Ib.*
3. But where an offence is created by one Act of Assembly, and the punishment prescribed or affixed by another, the better opinion is that its conclusion should be against the Acts of Assembly. *Ib.*

CRIMINAL LAW.—*Continued.*

4. Bank notes are considered and treated as money, and the true rule of their value as respects the graduating the offence of stealing, is the sum which upon their face they promise to pay. *Ib.*

DAMAGES.

1. The Act of 1794, ch 46, was passed to remedy the inconvenience existing in the execution of writs of inquiry before the sheriff, and was never intended, nor can it be construed to give a right to an inquiry of damages, where none existed before. *Hopewell vs. Price*, 201.
2. The common law did not give damages in replevin to a defendant; but they were allowed to certain defendants in that action, viz: avowments, or other persons making conusance, or justifying as bailiffs, for rents or services, by the Statutes, 7 Hen. VIII, ch. 4, and 21 Hen. VIII, ch. 19, which have not been extended to defendants claiming property; their remedy, where any exists, is by a suit on the replevin bond. *Ib.*
3. In the cases falling within the statutes above referred to, the damages recovered, are such as are sustained before the institution of the suit. *Ib.*
4. In an action upon a contract to pay in tobacco, the jury may give damages in money. *Laidler vs. State*, 202.

See EQUITY, 3.

EXECUTORS AND ADMINISTRATORS, 4.

DEBT.

See ACTION, 3.

PLEADING, 9, 11.

DEBTOR AND CREDITOR.

1. Where one is indebted in several sums, and is about to make a part payment, he has an undoubted right to apply that payment, to either the one or the other of those claims, as he thinks proper; and the creditor is bound to apply the payment, as directed by his debtor. *Mitchell vs. Dall*, 119.
2. Although a debtor may not give an express direction at the time of the payment, to which, of several debts, a payment made by him shall be appropriated, yet a direction may be implied from circumstances; but if no application has been made by the debtor, either express, or implied, then the creditor may apply it. *Ib.*
3. A copy of a letter addressed by a creditor to his debtor, contained in the letter-book of the former, advising the debtor that he had drawn on him for the amount of a particular purchase, is not evidence for such creditor in an action against a guarantee of the debtor, to establish that a payment shortly after received from such debtor, who was indebted on several accounts, was made in discharge of such purchase; though the draft itself, (or evidence of its contents if lost,) accompanied by a letter from the debtor to the creditor, regretting his inability to meet the draft, and promising speedy payment of that demand, followed by a payment a few days after the date of such letter, is evidence to show that it was made in discharge of that particular claim. *Ib.*
4. The letter of a debtor (or his acknowledged general agent,) to his creditor, directing him to which of two debts, a payment he was

DEBTOR AND CREDITOR.—*Continued.*

about to make him should be applied, is the best evidence, to show on what account such payment was received by the creditor. *Ib.*

5. Such letter in an action by the creditor, against the guaranties of the debtor for one of his debts, where several were due, is not considered as merely the declarations of a third person, but it is an act by the party, who had the legal right to make the application of the payment, directing in what manner it should be made. *Ib.*
6. Where goods were sold to L., and D. agreed to become answerable for them as a guarantee, upon L's default to pay for them at a fixed day, in an action against D. on his guaranty, it is essential that the declaration should contain an express averment, that the debt was not paid by L. at the expiration of the time limited for payment; for until there was default on the part of L., no responsibility attached upon D. *Ib.*
7. To recover upon an *insimul computassent*, in such case, it must appear there was an accounting between the parties after L's debt was due and owing. *Ib.*

See BOND, 3.

EQUITY, 5, 6, 7, 9, 14, 15, 17, 18, 19, 20, 21, 22, 52.

SALE, 6.

SURETY, 2, 3, 4.

DECEIT.

A defendant who purchased a slave at less than her value, and agreed at the time of the sale, not to sell her out of the State, but afterwards sold her to a person out of the State, is to be considered as guilty of a cheat, and responsible in damages therefor to the original owner of the slave. *Price vs. Read*, 213.

DEED.

See CONTRACT.

EQUITY, 12.

MORTGAGE, 5.

TRUSTS AND TRUSTEES, 1.

DESCENT AND DISTRIBUTION.

In the distribution of the personal estate of an intestate, who died leaving a mother, a brother of the whole blood, and four brothers and sisters of the half blood, a sister of the half blood is entitled to one-sixth of that estate under the Act of 1798, ch. 101, sub-ch. 11; for the terms, "and there shall be no distinction between the whole and half blood," in the 11th section of the above Act and sub-chapter, run through the whole of that sub-chapter. *Seekamp vs. Hammer*, 8.

DETINUE.

An action of *detinue* may be maintained in this State. *Dashiell vs. Dashiell*, 95.

DOWER.

Where the owner of a tract of land sold it, executed a bond for conveying the same to the purchaser, received a considerable part of the purchase money, and afterwards married, then conveyed the land to the purchaser and took a mortgage of the same premises from him, to secure a balance of the purchase money then unpaid, a

DOWER.—Continued.

right to dower at law vested in his wife, though under such circumstances she would not be dowable in equity. *Dimond vs. Billingslea*, 193.

See EQUITY, 16, 45.

EJECTMENT.

See EVIDENCE, 13, 14, 15, 17, 18, 19.

EQUITY.

1. The condition of an appeal bond to stay proceedings in equity, which contained a direct reference to the only decree passed by the Chancellor between the parties mentioned in the bond, must be construed in connection with the decree, in ascertaining its meaning. *Woods vs. Fulton*, 56.
2. An appeal by the representatives of a mortgagor, from a decree against them in favor of the mortgagee, for the sale of the mortgaged premises, unless the debt secured should be paid by a given day, and an appeal bond given by them to suspend execution of such decree, does not compel those representatives to guarantee the adequacy of the fund pledged by their ancestor, on an affirmance of the decree. *Ib.*
3. In an action on the appeal bond, in such case, the measure of damages is the actual injury suffered by the appellee from the delay, in whatever manner it arises. If the fund pledged was unequal to the payment of the debt at the time of the decree, the intermediate accruing interest was a clear loss to the plaintiff, occasioned by the delay of the appeal, and might properly have been made a standard for measuring his damages. *Ib.*
4. A decree, that unless the defendant shall, before a given day, pay to the complainant, or bring into Court to be paid to him, a certain sum of money, the mortgaged property mentioned in the proceedings should be sold, is a decree *in rem*. *Ib.*
5. On a bill for the sale of land mortgaged to secure the payment of a sum certain with interest, where the defendants admitted in their answer the original debt and mortgage, claimed no other credits than those allowed in the bill, and consented to a sale for the payment of the balance due to the complainant, the necessity for a decree to account, in order to ascertain the sum due before a sale was decreed, does not exist. *David vs. Grahame*, 73.
6. In a proceeding for the sale of the real estate of a person dying without leaving personal property, sufficient for the payment of his debts, it is necessary to make the executor or administrator of the deceased debtor a party. *Ib.*
7. Where a creditor is under no obligation to look to the personal estate of his debtor, as where he is seeking to subject to the payment of his debts a fund on which he has a specific lien, and with which the executor or administrator has nothing to do, he need not be made a party in such proceeding. *Ib.*
8. Under the 3d section of the Act of 1785, ch. 72, a defendant is ordinarily entitled to have a day given him, to bring in money on a decree for the sale of mortgaged premises; yet that being for his benefit, he may waive it; and where the answer confesses the com-

EQUITY.—*Continued.*

- plainant's claim, and consents to a sale for the payment of it, on such terms as to the Court should appear equitable, he is to be considered as having waived that benefit. *Ib.*
9. Where the Court in their decree direct a sale of mortgaged premises to be on a credit of twelve months, it is equivalent to a day being given to a defendant for the payment of the debt due by him. *Ib.*
 10. Chancery will not interfere, as between the parties, to set aside a fair voluntary conveyance; where the equity being equal, the volunteer having the law shall prevail. But it is now a clearly settled rule, that Chancery will not decree a specific performance of a mere voluntary covenant or agreement without consideration, to make a conveyance. *Black vs. Cord*, 78.
 11. Where a bond to convey certain land to H. executed by J. under his hand and seal, (there being no evidence of any consideration passing between H. and J.) was held to be a mere voluntary covenant or agreement, which did not entitle H. to the land itself, nor to a decree for a specific performance, nor to any part of the proceeds of the land which was sold on the application of the creditors of J. *Ib.*
 11. Whoever comes into the possession of an estate by fraud must account for rents and profits when the fraudulent conveyance is vacated. *Strike vs. M'Donald*, 142.
 12. Where a decree annulled certain deeds as fraudulent, and ordered the property mentioned in them to be sold, and reserved all equities as to the distribution of the proceeds for hearing on the trustee's report of the sale being filed, this reservation was held to have no view to the interest of the fraudulent grantee; and the deeds having been vacated, because they originated in a fraudulent combination to cheat creditors, were considered as void *ab initio*, and wholly wanting in legal fitness to stand as securities for any advances whatsoever. *Ib.*
 13. If a man has acted fraudulently and is conscious of a defect in his title, and with that conviction on his mind expends a sum of money in improvements, he is not entitled to avail himself of it. *Ib.*
 14. According to the course of the Court of Chancery, where the proceeds of property ordered to be sold for the payment of creditors, are insufficient to pay all, the interest is to be calculated only up to the day of sale. *Per BLAND*, Chancellor. *Ib.*
 15. Where a creditor files a bill, for the purpose of subjecting the property of his debtor to the payment of his own claim, and of all others who may obtain permission to come in, and participate in the burthens and the benefits, the others are allowed to come in, at any time either before or after the decree; and it is most usual and proper, that the decree itself should command the trustee to give notice at the time of advertising the property for sale, to all creditors to bring in their vouchers. *Ib.*
 16. When a bill is brought upon an equitable title, and there is a trust, and in the case of an infant, or where there has been any fraud, or in cases of dower, an account of the rents and profits will be ordered, and that from the time the title accrued until the defendant was put out of possession. *Ib.*

EQUITY.—*Continued.*

17. In what is commonly called a creditor's bill, and where two or more creditors bring such a bill, or others come in afterwards, the adjustment of their rights and interests in relation to each other, and the objections which the defendants may make against those who have come in after the institution of the suit, remain to be considered and decided when the Court is called on to make distribution of the fund. *Ib.*
18. Other creditors than the complainants in a bill may come in, and claim payment of their debt out of the proceeds of their debtor's property, although the bill itself contains no allegation that it was originated for their benefit; and the practice of this State is to allow them to come in and participate, by merely filing the vouchers of their claims with the register. *Ib.*
19. With regard to the proof of claims brought in by other creditors, the practice is as in cases of deceased persons' estates to require no higher proof than such as would induce the Orphans' Court to allow the claim according to the testamentary system, when no objections are made. *Ib.*
20. It is competent for the originally suing creditors to rely upon the Statute of Limitations, in opposition to the claims of other creditors, who have come in since the institution of the suit; but in applying the Statute of Limitations in such cases, it must be with all its saving provisos and also subject to the resuscitatory qualifications of such acknowledgments as are deemed sufficient to take a case out of the Statute. *Ib.*
21. A creditor cannot introduce other particulars and causes of action of a different description not mentioned or alluded to in his bill, after a decree, by a mere *ex parte* petition; if he intended to have relied on them, he should have amended his bill before decree. *Ib.*
22. The filing of the schedule of an insolvent debtor by one claiming to be a creditor, cannot be considered as filing a voucher of his claim. *Ib.*
23. When a commission from the Court of Chancery to take testimony, is returned, according to the practice of this State, it is opened by the Chancellor, or the register, and objections of every kind to the evidence are taken and considered, at the hearing of the cause. *Ib.*
24. Where the remedy at law is gone, Chancery will not revive it, in the absence of fraud, accident, or mistake. *Waters vs. Riley*, 223.
25. The case of a bond where all are principals, has been held to be an exception to the above rule, each being equally benefited, and under an equal original moral obligation to pay the debt, independent of the bond, to which equity relates back, when the remedy at law on the bond is gone. *Ib.*
26. In the case of a surety, who is bound only by the bond itself, and is not under the same moral obligation to pay, equity will not interfere, to charge him beyond his legal liability. *Ib.*
27. It is a general principle, that a surety who has paid the debt, may compel his co-security to make contribution, or may by substitution take the place of the creditor, and acquire all his rights against the principal debtor, but he can acquire no rights, that the creditor had not, and cannot, therefore, compel a contribution by the rep-

EQUITY.—*Continued.*

- representatives of his deceased co-security, against whom the creditor had no remedy. *Ib.*
28. C. and his wife, made a gift of a sum of money to J. their eldest son, which was deposited with W. who undertook the trust of purchasing a tract of land therewith for J's use. In 1792, he purchased the land and took a conveyance to himself. J. died without issue, under age, and his rights devolved on his brothers and sisters, the eldest of whom attained the age of 21 in 1805, and died during that year. In November, 1815, the heirs of J. the *cestui que trust* in fee, filed their bill against the heirs of W. for a conveyance of the land in conformity with his undertaking—*Held*, (the trust having been fully established,) that the lapse of time, between the time of purchase and filing the bill, formed no bar to the proceedings. *Oehler vs. Walker*, 287.
29. The cause, however, having been 12 years in the Court, from its commencement to the final decree, and many of the parties on each side of the docket, having died during that period, the Court, under the circumstances, determined to say nothing of the rents and profits received, or the improvements made by the trustee, (who was in possession for a part of the time,) or his representatives; but only to decree a conveyance in fee. *Ib.*
30. The County Court, as a Court of equity, having expressed an opinion upon the law and facts in the cause, in favor of the complainants' right: and as they were to be relieved, the only subject was, the extent of such relief. But as in the then stage of the cause, full justice could not be done, in order, therefore, that a final decision should be made—*Ordered*, that the auditor state an account between the parties, &c. Such account was stated by the auditor. After which that Court overruled the opinion before expressed upon the law and facts, and dismissed the bill. On appeal, the Appellate Court examined the whole case, and decided that the decree dismissing the bill be reversed. *Ib.*
31. Where land was sold under a decree, and the sale, after opposition by the purchaser, was ratified; but the trustee received neither notes, nor bonds, for the payment of the purchase money, and the period for payment having expired, the Chancellor ordered the purchaser, to pay to the trustees or bring into Court, the amount of the purchase money, and interest, before a given day, or show good cause to the contrary. The purchaser having failed to comply, the Chancellor then ordered an attachment against him, to enforce obedience to his first order. On appeal—*Held*, by the Appellate Court, that under the circumstances of this case, the Chancellor had a right to adopt the proceeding to which he resorted. *Ib.*
32. A trustee having sold lands by order of the Court of Chancery, and reported his proceedings to that tribunal, where after objections taken thereto by the purchaser, they were ratified, and the ratification, on appeal, being sanctioned by the Appellate Court, it is no longer competent for such purchaser to contest the propriety or validity of that sale, nor to object, that he was not reported in the usual way to the Court of Chancery, as the purchaser of the property sold. *Ib.*

EQUITY.—*Continued.*

33. Where a tract of land is sold, as containing a given quantity of acres, and it is discovered that less is included than was conceived at the time of the sale, a deduction will be made, unless the deficiency shall be such as would have prevented the contract, if known at the time of the purchase; that is, the deficiency appearing to be in that part, which was the chief inducement to purchase. *Per* JOHNSON, Chan. *Ib.*
34. If a trustee, who is directed by a decree to sell a tract of land entire, and at public sale, should sell it at private sale, and in parcels, or in any other manner different from the mode prescribed, and report satisfactory reasons for doing so, and no objection is made, the sale may be ratified. *Per* BLAND, Chan. *Ib.*
35. If there should be made to appear, either before or after a sale has been ratified, any injurious mistake, misrepresentation, or fraud, the biddings will be opened, the reported sale rejected, or the order of ratification rescinded, and the property again sent into the market, and resold. *Ib.*
36. To all sales under the orders and decrees of the Court of Chancery the rule *caveat emptor* has been applied. *Ib.*
37. To a bill of discovery filed by an executor against the widow of his testator, charging her with retaining from him a certain sum of money, and certain *choses in action*, belonging to the estate of his testator, and that no person was present when she possessed herself of them, the defendant demurred, and assigned for cause, that the discovery did, and might by the laws of this State, subject her to certain pains and penalties; but the Court overruled the demurrer, and held that the allegations in the bill were not of such a character as would, if answered, subject the defendant to the apprehended consequences. *Wolf vs. Wolf*, 285.
38. A defendant in equity is not bound to make any discovery in answering a bill that would subject him to the punishment of the law by a criminal prosecution, or would cause him to incur any pains, penalties or forfeitures. *Ib.*
39. But it must appear, either by the bill of the complainant, or plea of the defendant, that his answer may subject him to punishment, or he will be compelled to make the discovery asked for in the bill. *Ib.*
40. If no such penal consequence will follow, it is the undoubted right of a complainant to ask, and the duty of the defendant to make, the discovery sought, in aid of the administration of civil justice. *Ib.*
41. A discovery may be had not only to support an action, but as auxiliary to the maintenance of a suit then contemplated to be brought. *Ib.*
42. Where, upon a petition filed by the purchaser of a tract of land from a trustee appointed by the Court of Chancery, to vacate the sale, it was *held*, that the grounds alleged in support of said petition were not sufficient to discharge said purchaser from his contract. *Weems vs. Brewer*, 291.
43. A purchaser claiming to be discharged from his contract, should make out a fair, and plain case for relief; and it is not every defect in the subject sold, or variation from the description, that will avail him.

EQUITY.—*Continued.*

- If he gets substantially what he bargains for, he must take a compensation for the deficiency. *Ib.*
44. Chancery weighs the object and inducement of the purchaser; and looking to the merits, and substantial justice of each particular case, if the sale be fair, relieves or not, from the purchase, according as the character of the transaction, and circumstances may appear to require. *Ib.*
45. A widow has a right to ask in equity part of a fund in lieu of dower, where that fund has been produced by the sale of her husband's lands, which were subject to her dower, and increased, by being sold clear of that incumbrance with her approbation, and consent; and where she has assigned such a claim, her assignee will succeed to her rights. *Maccubbin vs. Cromwell*, 330.
46. An audit may be examined on appeal, although no exceptions were taken to it in Chancery; and if the Chancellor acted upon improper testimony, or mistook the principles of law, the audit will be reformed, or the decree reversed. *Ib.*
47. Where funds are in the Court of Chancery, and a party petitions to have them applied in discharge of his claim, it has long been the uniform practice of that Court in this State, to receive the papers, on which the claim is founded, as *prima facie* evidence, and the Chancellor acts on them accordingly, unless the testimony is put in issue, and full proof required by the opposite party. *Ib.*
48. This practice is founded in convenience, to save expense to suitors in that Court, and ought not to be disregarded. It does not deprive the party of his right to have full proof, if he thinks proper to demand it. He may file exceptions to the report of the auditor; and, even if the report has been confirmed, upon petition the Chancellor would direct it to be opened, and strict legal proof would be required. *Ib.*
49. If exceptions are filed, the testimony is put in issue, and the Chancellor ought to require full proof; if he proceeds without strict legal evidence, it would be error. *Ib.*
50. The report of a trustee appointed by the Court of Chancery, made under oath, stating that he had sold a tract of land "free and clear of all right and title of dower of M. the widow of the deceased tenant in fee, she having conveyed, for a valuable consideration, all her interest in the premises to C.," together with the deed of M. to C. for her dower, is sufficient *prima facie* evidence, to enable C. to sustain a claim, by petition, for at least a less sum than the value of M's dower, to be paid out of the proceeds of such land, which were in that Court for distribution. *Ib.*
51. Tenants, holding land adversely to petitioners claiming a sale of it as the devisees of one who had formerly been seized, cannot be ejected by the Court of Chancery, for refusing to obey an order of that Court, enjoining such tenants to deliver up possession to a purchaser under a decree for a sale, to which they were not parties. *Frazer vs. Palmer*, 347.
52. Where a creditor has a right to resort to the joint and several funds of two debtors for the payment of his claim, the Court of Chancery has no authority to limit that right, and to decree, that if the funds of one of the debtors shall not be sufficient to discharge one-half

EQUITY.—*Continued.*

the debt, the creditor shall not look to the other debtor for the deficiency. *Hoye vs. Penn.*, 350.

See APPEAL AND ERROR, 6, 7, 8, 9.

COURTS.

DOWER.

MORTGAGE, 3.

PROMISSORY NOTES, 1.

SURETY, 2.

TRUSTS AND TRUSTEES, 1.

ESCAPE.

See ACTION, 3.

ESTATES FOR LIFE.

Where it was held that a certain devisee under a will took only an estate for life. *Edelen vs. Smoot*, 209.

EVIDENCE.

1. In an action of replevin for a slave, where the plaintiff derived his title under a will, a copy certified by the register of wills under his seal, is competent evidence. *Raborg vs. Hammond*, 32.
2. Where it was *held*, that certain evidence of the times of the respective deaths of two brothers, so far as the information of the witness was derived from their deceased father and sister, was admissible to prove which of the two brothers survived the other. *Ib.*
3. The agent of an executor in the settlement of the testator's estate, to show himself entitled to compensation for his services, may offer in evidence the receipts of the representatives for their portions of the estate taken acknowledged, and recorded according to law. *Carroll vs. Tyler*, 42.
4. Copies of such receipts, duly attested under the seal of the recording office, are also evidence for the same purpose. *Ib.*
5. Where representatives of a deceased party made acknowledgments of receipts to an executor, for their portions of a testator's estate, before a Justice of the Peace, or register of wills of any county, in the absence of proof of actual residence elsewhere, they will be presumed to reside in the county where the acknowledgments were taken. *Ib.*
6. Judgment was obtained against B., W. and R. as administrators of B., which was entered for the use of S. The defendants appealed, and filed an appeal bond to S. as the obligee, reciting an appeal from a judgment rendered against B., W. and R. The judgment appealed from being affirmed by the Appellate Court, in an action on the appeal bond, the plaintiff assigned, as a breach of the condition, the affirmance aforesaid, and that the judgment affirmed and that mentioned in the bond were the same. The defendants rejoined they were not the same; on which the parties joined issue—*Held*, that after oyer the bond declared on became parcel of the record, and it then appeared judicially to the Court, that the judgment recited in the bond upon which the plaintiff had declared, was not the same as that relied upon in his replication, and of course the record of the affirmed judgment above mentioned was inadmissible in evidence under the issue joined. *Birckhead vs. Saunders*, 64.

EVIDENCE.—*Continued.*

7. In an action to recover the value of work and labor performed in the defendant's service, he cannot give in evidence the declarations of the mother of the plaintiff, that she had sent the plaintiff to serve the defendant under an agreement between her and the defendant, that the plaintiff was to serve for his victuals and clothes, although the plaintiff, at the time he went into the defendant's service was a minor, and his mother was his only parent then alive. *Berry vs. Waring*, 81.
8. The fact that a witness had once seen an entry in a Bible belonging to the plaintiff's father, in his hand-writing, of the birth of the plaintiff, which Bible was not produced, nor its absence accounted for at the trial, does not preclude such witness from stating his recollection of the time of the plaintiff's birth, independently of the entry. *Ib.*
9. The well settled rule of law, that parol evidence cannot be offered to explain, contradict or add to the terms of a written contract, does not preclude a representative of the grantor from going into extrinsic evidence to show the true character and design of a conveyance of personal property, where no effort is made to impeach or defeat the title of the grantee, or to alter or impair his rights under it; but only an inquiry into the title of the parties to other property, in which such conveyance is incidentally used as evidence. If the door to such an examination were occluded, the provisions of the Act of 1798, ch. 101, respecting advancements, would become a dead letter in most cases, where written instruments are used to give validity to the settlement intended. *Stewart vs. Riggin*, 87.
10. The surety in a replevin bond is not a competent witness for the plaintiff, in the action of replevin. *Morton vs. Beall*, 102.
11. If it is discovered during any part of a trial, that a witness is interested, his evidence shall be struck out. *Ib.*
12. Where the interest of a witness is discovered after his examination, it is the duty of the Court to direct the jury to discard his evidence, although both parties may have informed the Court, that the testimony was closed, and the witnesses had been discharged—the party making the objection having omitted to disclose it at an earlier period, with no intention of ensnaring his adversary. *Ib.*
13. It is the modern practice in location causes to offer in evidence all the plots and explanations returned under the warrant of resurvey, which is an excellent course, well calculated to lay the whole subject before the Court and jury. *Stoddert vs. Manning*, 110.
14. A letter of a deceased surveyor, with his plot and explanations, of the lands in dispute, made up chiefly of his statements and opinions, which did not give his declarations of former runnings of the lands, which he performed as surveyor, or to which he was in any way a witness, nor describe with sufficient precision to be understood, the place and extent of the lines of the tracts therein referred to, and in the survey of which he acted as an assistant, are not competent evidence to go to the jury. *Ib.*
15. Where the record of a commission to take depositions, &c. was not produced, nor did it appear by what authority, nor under what law it was issued, nor in what manner, or under what notice it was exe-

EVIDENCE.—*Continued.*

cuted, copies of depositions obtained from the Court of Chancery, which purported to have been taken in obedience to a commission issued by that Court in the year 1713, for the swearing and examining of evidences relating to the boundaries of a tract of land, called by the same name with that for which an action of ejectment was brought, are not competent evidence; although the register of that Court informed the lessor of the plaintiff that the report of the commissioners containing the depositions aforesaid, was the only paper relating thereto that he could find in his office, upon diligent search. *Ib.*

16. A witness cannot excuse himself from giving testimony, on the ground that he is called to swear against his interest. *Ib.*
17. In an action of ejectment where defence is taken on warrant and plots are returned, an objection to the competency of a witness on the score of interest, cannot prevail, where the interest of the witness is not located on the plots; and his own private plot, made to demonstrate his interest, cannot be received in evidence for that purpose. *Ib.*
18. A witness who declined to give evidence of a particular boundary, although in the execution of the warrant of resurvey, he was at the place where it stood, and was called upon by the plaintiff to testify in relation to it, may yet at the trial be called on to testify thereto, though not sworn on the survey. *Ib.*
19. A witness who was not on the resurvey, and did not show to the surveyor a certain division line, is not competent to give evidence, in reference to such line, to the jury. *Ib.*
20. Where there is a full recovery, the record of it may be given in evidence on *non assumpsit*; and it is conclusive in bar, if the subject-matter in dispute has been before decided on by a Court of competent jurisdiction, between the same parties. *Offutt vs. Offutt*, 133.
21. The record of an action of *assumpsit* between the same parties, in which the jury assessed the plaintiff's damages at a less sum than \$50, and the Court, for want of jurisdiction, gave judgment for the defendant, treating the verdict as a nullity, is no evidence of the former recovery of the debt due from the defendant to the plaintiff, nor can it operate as a bar in another action for the same debt. *Ib.*
22. A second suit brought on the same cause of action, cannot be sustained by the verdict in the former suit, where the sum ascertained by the jury was below the jurisdiction of the Court. *Ib.*
23. A parol agreement between a landlord and his tenant, that the latter should surrender the residue of his term in the premises leased, to a purchaser, in consideration of which, the landlord agreed to give up the rent in arrear, is void as being within the Statute of Frauds, and inadmissible in evidence on an issue joined in an action of replevin between such tenant and the bailiff of the landlord, in which the arrears of rent were claimed. *Lammott vs. Gist*, 322.
24. A bank charter granted by the Governor of one of the United States, reciting his authority by the laws of that State to make such grants, and authenticated by the great seal thereof, in the absence of proof that its laws did not warrant such an exercise of authority on the

EVIDENCE.—*Continued.*

part of the Governor, is sufficient evidence *per se* to prove the existence of such bank. *Agnew vs. Bank of Gettysburg*, 354.

See ACTION, 4.

APPRENTICE, 2.

DEBTOR AND CREDITOR, 3, 4, 5.

EQUITY, 19, 47, 48, 49, 50.

GUARANTY, 1.

LAW AND FACT, 5.

ORPHANS' COURT, 2.

PARTNERSHIP, 1.

PLEADING, 2, 6, 7, 19.

PROMISSORY NOTES, 2.

SALE, 1, 2, 5.

SLANDER.

TAXES AND TAX COLLECTOR, 1.

WARRANTY, 9.

EXECUTION.

1. A sheriff returned a *feri facias* "laid per schedule, and property sold to B. for \$750. Resold to H. for \$725, and sale not complied with, and of course on hand." The schedule showed a levy on several parcels of land—*Held*, (on the plaintiff's motion to quash the return,) that the officer might well return those facts, and if they were according to the truth of the case, which *prima facie* must be presumed, he was certainly justified in returning them in a special manner, instead of returning in general terms, that the property was unsold, and on hand for want of buyers. *Scott vs. Brice*, 193.
2. A sheriff has a right, and it is his duty, in due time to correct his return to a *feri facias*, so as to make it conform to the truth of the fact, whatever that may be, and to give it effect and legal operation. *Berry vs. Griffith*, 247.
3. It is not true, that land when taken in execution, must be described in the schedule returned with the writ and advertisement, of its intended sale, with technical minuteness. *Ib.*
4. A sheriff cannot sell what has not been levied upon under the *fi. fa.*, but a general description in the schedule returned with the writ, and in the advertisement of sale, is sufficient. *Ib.*
5. The return should regularly, for the security of purchasers, describe the premises with precision; but it is enough, if the description, be such, as that the property may be clearly identified. *Ib.*
6. Where a sheriff's return to a *feri facias*, was held to show a valid sale by the sheriff. *Ib.*
7. A sheriff may divide, and sell a part of the premises levied upon, and advertised, and where that will satisfy the debt, he ought to sell no more. *Ib.*

See APPEAL AND ERROR, 4, 5.

JUDGMENT.

EXECUTORS AND ADMINISTRATORS.

1. In an action on a testamentary bond, a plea that since the last continuance of the cause, the Orphans' Court of the county which granted the letters testamentary, had revoked them, is no bar to the plaintiff's right of recovery. *State vs. Blackistone*, 104.

EXECUTORS AND ADMINISTRATORS.—*Continued.*

2. Where letters testamentary or of administration have been revoked pending the suit, the delinquent executor or administrator, is deprived of no honest defence which should be made to the action. *Ib.*
3. If no assets have come to his hands—if he has administered them—if preferred creditors will consume the whole estate—if he has satisfied the claim, or on any ground it be unfounded in law or fact, it may be pleaded in bar of the action. *Ib.*
4. If there be other debts outstanding, or paid, or if the property of the deceased has, under the order of the Orphans' Court, been delivered over to a new administrator, it may be pleaded, not as a complete bar to any recovery, but it will confine the plaintiff to nominal damages, or such other damages as a Court and jury, under all the circumstances of the case, shall think him entitled to recover; but if no new administrator has been appointed, judgment should be rendered as if the letters testamentary had not been revoked. *Ib.*

See BOND, 7.

EQUITY, 6, 7, 37.

EVIDENCE, 3, 4, 5.

NEGROES AND SLAVES.

ORPHANS' COURT, 1, 2, 3.

PLEADING, 2, 14.

SALE, 2, 3, 4, 5.

FRAUD.

See EQUITY, 11, 12, 13, 16.

PLEADING, 21, 22.

TRUSTS AND TRUSTEES, 1.

WARRANTY, 6, 7.

GUARANTY.

1. Where it was *held*, that there was evidence from which the jury might infer, that the plaintiffs accepted the defendant's letter as a guaranty for a loan by them to a certain third party, and that said letter was a conclusive guaranty, for the eventual repayment of a loan not exceeding the sum mentioned in it. *Caton vs. Shaw*, 11.
2. Where one makes a mere overture or offer to guarantee the transactions of another, he is entitled to notice of its acceptance before he can be held liable as guarantor: but in the case of an absolute guaranty, no such notice is necessary. *Ib.*

See DEBTOR AND CREDITOR, 6, 7.

GUARDIAN AND WARD.

1. The interest or income of a minor's estate is the fund out of which he is to be maintained and educated, and under no circumstances could be exceeded, until the Act of 1785, ch. 80, was passed; by the 9th section of that law, the Orphans' Court may allow the guardian to apply a part of the personal estate, not exceeding a tenth, to the education of his ward; and the Act of 1798, ch. 101, sub-ch. 12, s. 10, only enlarged that authority, by extending the expenditure to any part, or the whole of the personal estate. *Brodess vs. Thompson*, 91.
2. Should an application of the personal estate not suffice to maintain and educate a ward, suitably to his future destination, then such

GUARDIAN AND WARD.—*Continued.*

maintenance and education may also induce an application of a part of the real estate, with the approbation of the Court of Chancery, as well as the Orphans' Court. *Ib.*

3. It is the province of the guardian under our laws to take care of the person of his ward; and it peculiarly belongs to his office, to keep together and preserve his property of every kind and description. Repairs necessary for those ends, within the compass of the ward's income, ought to be attended to, but schemes of improvement under no circumstances ought to be engaged in; and the Orphans' Court have no authority to sanction them, by an application of any part of the minor's estate. *Ib.*

HUSBAND AND WIFE.

See TRUSTS AND TRUSTEES, 1.

INFANT.

See EQUITY, 16.

EVIDENCE, 7.

INTEREST.

See EQUITY, 3, 14.

JUDGMENT.

1. Where two are liable on a joint and several obligation, and several judgments are obtained against each, which are severally superseded, if one pays the whole sum he is entitled to an assignment of the original judgment against the other, which he can use by way of execution against the other to the extent for which he was that other's surety; but he is not entitled to an assignment of the supersedeas judgment against the other, for that would make other persons liable to the surety, whose responsibility was not contemplated when he became surety for his principal. *Hollingsworth vs. Floyd*, 67.
2. Judgments not resting wholly on confession, will be reversed for want of pleading in due form. *Laidler vs. State*, 202.
3. Where it was held, that the County Court had no authority under the circumstances of the case to strike out the *fiat* entered on a *scire facias*, upon a certain judgment against an intestate. *Munnikuyson vs. Dorsett*, 277.
4. The appearance of an attorney, without proof of an authority derived from a defendant, does not *per se* invalidate a judgment. *Ib.*
5. If loss be sustained thereby, the attorney must answer in a civil action by the party injured. *Ib.*
6. Where the County Court strike out a judgment under the Act of November, 1787, ch. 9, s. 6, they are bound to order regular continuances of the cause, from the time of the rendition of the judgment to its being stricken out, to be entered on the docket, so that the matters in dispute may be fairly brought to trial—their failure to do this, works a discontinuance of the action, and an appeal lies from such order. *Ib.*
7. Judgments at law are not lightly to be interfered with; and it must be a strong case to induce the Court to strike out a judgment of almost eight years standing. *Ib.*

JUDGMENT.—*Continued.*

8. Where a judgment is stricken out, it is the duty of the Court, under the Act of 1787, ch. 9, s. 6, to direct the suit to be brought up by regular continuances. *State vs. Cor*, 283.
 9. Bills of exceptions are no part of the pleadings, and it is alone on the pleadings and verdict, that the Court pronounce judgment. *Agnew vs. Bank of Gettysburg*, 354.
- See BANKRUPTCY AND INSOLVENCY, 2.
EVIDENCE, 6.
PLEADING, 10, 13.
SURETY, 1, 2.
VERDICT, 3.

JURISDICTION.
See COURTS.

JURY.
See VERDICT, 3, 4.

LANDLORD AND TENANT.
See EVIDENCE, 23.

LAW AND FACT.

1. On a case stated, the sole duty of the Court is to declare the law on those facts only which the statement contains, and its power is restricted within the same limits, as when called on to give judgment on a special verdict. *Stewart vs. State*, 87.
 2. So where the question was, whether a bill of sale of property, executed by a father to his infant child, which purported on its face to have been given for a valuable consideration, was adopted by him as a convenient form of conveyance, to make a settlement on his daughter; and the case stated did not describe it as wholly gratuitous, though there was evidence, from which a jury might have inferred that such was the design of the father—The Court held that they could not contradict the facts of which the bill of sale was testimony, and refused to consider the property, thus conveyed to the child, as an advancement. *Ib.*
 3. That prerogative of the Court which authorizes them to withdraw from the jury the consideration of the facts, is never exercised but in cases where the evidence is so indefinite and unsatisfactory, that nothing but wild irrational conjecture, and licentious speculation, could induce a jury to pronounce the verdict which is sought at their hands. *Ferguson vs. Tucker*, 136.
 4. Where certain proof was held proper to be weighed by a jury, who were to determine whether the defendant knew after a specified date, that a certain person in his employment was an apprentice; and the Court ought not in such case, to say that the jury could not find such knowledge. *Ib.*
 5. Upon a case stated, as upon a special verdict, the Court are not at liberty to infer facts from the evidence therein, but the fact relied upon must be stated. *Reeside vs. Fischer*, 235.
- See WARRANTY, 3, 4, 8.

LEVY COURT.
See TAXES AND TAX COLLECTOR, 2.

LIEN.

See EQUITY, 7.

LIMITATIONS.

1. The plea of limitations has been adjudged not to be a plea to the merits, and the universal practice has accordingly been never to permit it to be amended, and to demand that it should be filed by the rule day. It has never been received, unless by consent of the parties, by a mere docket entry of the plea, or otherwise than at length. *Wall vs. Wall*, 61.
2. There being several actions on the same bond, one against the principal—another against his surety, the same counsel acting for both, the plea of limitations being filed by him in one suit, he cannot direct the clerk of the Court to file a similar plea in the other *mutatis mutandis*, but the plea must be filed at length in both, for those suits, as to all questions of pleading, are as separate and distinct, as if they had been brought on different causes of action. *Ib.*

See APPEAL AND ERROR, 3.

EQUITY, 20.

PLEADING, 11.

MASTER AND SERVANT.

1. A master is answerable for all injuries arising from the negligence, or unskilfulness of his servant in executing duties assigned him; but when he abandons his duty, and wilfully becomes a wrong-doer, the master is exempt from all responsibility for such wrongful acts. *Brown vs. Purviance*, 232.
2. B. the harbor-master of the City of Baltimore, acting in obedience to a lawful order of the board of health of that city, ordered a vessel, belonging to the plaintiff, to be removed from a wharf, and moored in the stream. He employed C. to perform that duty, who having finished it, with his associates, hired for the purpose aforesaid, returned from the vessel to the shore, in a boat belonging to her, which they there abandoned, and was lost to the plaintiff. The boat was demanded of B. by the plaintiff, and he having omitted to return her, an action of trover was brought against him—*Held*, that from the time the vessel was moored in the stream, C. ceased to be B's agent, and that for no acts of his or their consequences after that period was he responsible. *Ib.*

MORTGAGE.

1. A mortgage, or bill of sale, of personal property made upon a good consideration, as, to indemnify the grantees against suretyships entered into, and to be entered into, is available between the immediate parties to the instrument, although not recorded. *Hudson vs. Warner*, 310.
2. Where a mortgage was executed of the entire stock in trade in the mortgagor's store, and three years afterwards, the stock in the same store was sold by trustees for the benefit of his creditors, in the absence of evidence, that in the intermediate time, there was an entire sale of the original stock, or that the part sold was replaced, or that any new stock was purchased and mingled with the old, it

MORTGAGE.—Continued.

will be intended, that the sales made by the trustees, were of the remnant of the stock of goods mortgaged. *Ib.*

3. The grantee of a second mortgage of personal property recorded in time, with notice of a prior mortgage which was not duly recorded, is bound by the equitable rights of the first mortgagee, unless upon inquiry into the nature of his claim, the first mortgagee had led him to believe, that his incumbrances were removed, in which case, equity would never interpose to invalidate his legal title. *Ib.*
4. The retention of possession of personal property, by a vendor, will not contaminate his transfer, where his deed showed, that the sale was not to have its completion immediately, but was prospective to a future event; till that future time, his possession is entirely consistent with his deed. *Ib.*
5. The failure of a mortgagee of personal property, to take possession at the time of the forfeiture, as stipulated in the mortgage, does not vitiate a deed, which in its inception was valid and effectual. *Ib.*

See EQUITY, 2, 4, 5.

NEGROES AND SLAVES.

On a petition by certain slaves against the administrator of J. C. with the will annexed, in which they claimed freedom, it appeared that J. C. whose property they were at the time of his death, had declared them free by his last will and testament, and thereby provided that if his personal estate, exclusive of such slaves, should not be sufficient to discharge all his just debts, then his executor or administrator might sell so much of his real estate as would pay his debts, so as to have his slaves free: that the testator's personal estate, exclusive of the said slaves, would not pay his debts, and that the administrator admitted the testator's real and personal estate, exclusive of the slaves, was sufficient to pay his debts—*Held*, that the petitioners were not entitled to freedom. *Negro George vs. Corse*, 1.

See DECEIT.

EVIDENCE, 1.

NOTICE.

See ACTION, 1, 2.

GUARANTY, 1.

PROMISSORY NOTES, 3.

ORPHANS' COURT.

1. The Orphans' Court of one county have no authority to grant letters of administration on the estate of a person who resided and died in another county. *Raborg vs. Hammond*, 32.
2. By the Act of 1798, ch. 101, sub-ch. 5, s. 3, the Orphans' Courts are expressly enjoined to inquire into and adjudicate on, the "time and place" of the death of a deceased intestate. That duty, however, is presumed to have been rightfully discharged, when the question of administration incidentally arises in other Courts; and therefore, in a suit instituted by the administrator, it is not competent for a Court of law to go into an inquiry whether administration has been rightfully granted or not. *Ib.*
3. If letters of administration have been improvidently issued, or have been obtained by fraud, or deceit, they may be revoked by the

ORPHANS' COURT.—*Continued.*

Orphans' Court upon application made for that purpose: the power of revocation under such circumstances, being necessarily inherent and a part, and of the essence of the power delegated to them, of granting administration. *Ib.*

4. The Orphans' Courts derive their powers mostly from statutory provisions, and are tribunals confessedly limited in their jurisdiction—unable to exercise any authority whatever not expressly given by law. *Brodess vs. Thompson*, 91.

See GUARDIAN AND WARD. 1, 3.

EQUITY. 19.

PARTNERSHIP.

1. In an action, against one partner, by the payee of a partnership note, to recover the amount thereof, the other partner is a competent witness for the defendant, to prove that the consideration of said note was for the witness' exclusive benefit, given to secure a debt due by him on his own account; and that when he signed the note he informed the plaintiff that he was not authorized to sign the defendant's name to it. *Robertson vs. Mills*, 77.
2. In the legal acceptation of the term dormant, as applied to partners in trade, every partner is considered dormant, unless his name is mentioned in the firm, or embraced under general terms as the name of one of the firm and company. *Mitchell vs. Dall*, 119.

See ASSUMPSIT, 1.

PLEADING, 5, 8.

PAYMENT.

See DEBTOR AND CREDITOR. 1, 2.

PHYSICIAN.

See ACTION, 1, 2.

PLEADING.

1. Matter in bar which shows the irresponsibility of the defendant at the commencement of the suit, may be given in evidence under the general issue without being reduced to the form of a special plea. *Osgood vs. Spencer*, 99.
2. So in an action against the executor of one of several makers of a joint promissory note, to recover the amount thereof, where the other co-drawers were alive at the commencement of the suit, it is not necessary for the defendant to plead their survivorship in abatement, but it may be given in evidence under the general issue. *Ib.*
3. Upon a general demurrer to a declaration, the only question to be determined by the Court, is whether the facts contained in it, (the truth of which are confessed by the demurrer,) show such a case as can be enforced in a Court of law. *Weems vs. Millard*, 107.
4. How far the allegations in the declaration can be sustained by proof, or what is the legal effect of the contract signed by the defendant, (a copy of which was exhibited in a part of the record not under consideration,) are inquiries which do not arise under such a state of pleadings. *Ib.*
5. It is a general rule, that all the parties composing a firm must be named as plaintiffs, and an omission to name them, may be taken advantage of on *non assumpsit*; but there is an exception to this rule.

PLEADING.—*Continued.*

- for where there are dormant partners, it is not necessary they should be named in the writ. *Mitchell vs. Dall*, 119.
6. No principle of pleading is more firmly settled, than that whether the action be in debt, *assumpsit* or tort, if it be necessary to allege a contract, such allegation requires corresponding proof. *Ferguson vs. Tucker*, 136.
 7. An unnecessary averment of a breach or infringement of a contract declared on, need not be proved, and may be rejected as surplusage. *Ib.*
 8. In an action of *assumpsit* where the declaration contained only the money counts, under the general issue, it is no variance, for the plaintiff to give in evidence a promissory note, made payable to him, by a firm, of which the defendant was a partner. *Neal vs. Fisher*, 199.
 9. From the earliest period to this time, tobacco had been considered in our judicial proceedings as current money, and actions of debt on bonds for the payment of it, have been constantly brought in the *debet* and *detinet*, without averring its value in the current coin of the State. *Crain vs. Yates*, 244.
 10. It has been the practice in actions of debt, to join tobacco and money counts, and the invariable course to render judgments in debt for tobacco, and costs in current money, or for costs in tobacco at a fixed and established value in current money. *Ib.*
 11. In an action of debt, the plaintiff having declared on two obligations, one for the payment of tobacco at a given day, and the other of money on demand, the defendant cravedoyer "of the writing obligatory aforesaid," and of the writ, (a blank for the insertion of which was left.) and then pleaded the Statute of Limitations in two distinct pleas, neither of which referred expressly to either obligation, and in both of which, the date of issuing the writ was omitted. On a joinder on a special demurrer by the plaintiff assigning the above as causes of demurrer, the Court held the pleas faulty in not ascertaining the time of the commencement of the action, nor discriminating between the obligations, to one of which limitations was no bar. *Ib.*
 12. When a plea is only intended for a part of the declaration, the rule is, it must not cover the whole, but ascertain the part to which it is applied, or the plaintiff may demur. *Ib.*
 13. Under a rule to plead issuably, such uncertain pleas would be deemed no plea, and the plaintiff might take judgment as for want of a plea. *Ib.*
 14. In an action on an administration bond, a replication which showed the existence of a debt due from the intestate, and that the administrator was in insolvent circumstances, would render the surety liable, unless he could prove that the estate of the deceased had been duly administered. *State vs. Cox*, 283.
 15. Where matter of defence arises from the institution of a suit, it must in general be specially pleaded, and cannot be given in evidence under the general issue. *Agnew vs. Bank of Gettysburg*, 354.
 16. Defences arising after the commencement of the action, should be pleaded *puis darrein continuance*, or against the further maintenance of the suit. *Ib.*

PLEADING.—*Continued.*

17. When the defendant pleads the general issue in assumpsit, he asserts that at the time of the commencement of the suit, some reason existed, which should have prevented the plaintiff from bringing his action. *Ib.*
18. So where in the trial of an action of assumpsit by a chartered company, under the general issue, the plaintiff having given a charter in evidence, by which it appeared that the duration of the company was limited to a period subsequent to the commencement of the suit, yet anterior to the time of trial, the defendant cannot avail himself of that fact to non-suit the plaintiff. *Ib.*
19. Under the general issue in a suit by a corporate body, it is necessary for the plaintiff to shew its charter. *Ib.*
20. Yet where such charter is a public law, which judicial tribunals are bound to notice *ex officio*, it is not necessary to give it in evidence to make out the plaintiff's title. *Ib.*
21. After verdict, the allegation of fraud and deceit in a declaration, is equivalent to the charge of an actual *scienter*. *Osgood vs. Lewis*, 363.
22. In cases of express warranty, averments of fraud and deceit are immaterial. *Ib.*

See APPEAL AND ERROR, 2, 3.

APPRENTICE, 1, 2.

ASSUMPSIT, 2.

BOND, 1, 2.

DEBTOR AND CREDITOR, 6.

EQUITY, 6, 7, 37, 38, 39.

EVIDENCE, 20.

EXECUTORS AND ADMINISTRATORS, 1, 3, 4.

JUDGMENT, 2, 9.

LIMITATIONS, 1, 2.

VERDICT, 4.

WARRANTY, 9.

PRACTICE.

See APPEAL AND ERROR, 2.

EQUITY, 18, 19.

EVIDENCE, 13.

LIMITATIONS, 1.

PRINCIPAL AND AGENT.

The register of wills of a county where letters testamentary were granted, acting as the agent of an executor or administrator in the settlement of an estate, is on a footing with every other individual in the community, and entitled to compensation for his services as agent, though for those rendered in his official character, he can charge nothing but what the fee bills allow him. *Carroll vs. Tyler*, 42.

See EVIDENCE, 3, 4.

MASTER AND SERVANT.

PROMISSORY NOTES.

1. On a joint promissory note, after the death of one of the drawers, the remedy at law exists alone against the surviving drawers, and is extinguished against the representatives of the deceased drawer.

PROMISSORY NOTES.—*Continued.*

The only remedy which the payee or endorsee has against such representative, is in equity. *Osgood vs. Spencer*, 99.

2. The demand of payment of a note, payable at a particular place, by one having it in possession, at such place, and on the day it fell due, is presumptive evidence of his authority to demand and receive payment. *Agnew vs. Bank of Gettysburg*, 354.
3. When a note payable at the town of G. fell due on Saturday, and notice of its dishonor on that day was delivered to the endorser, a resident at E., on the ensuing Monday, and no evidence was offered of any mail between those towns on Saturday or Sunday, such notice is sufficient. *Ib.*

See PARTNERSHIP, 1.

PLEADING, 8.

REGISTER OF WILLS.

See PRINCIPAL AND AGENT.

REMOVAL OF CAUSES.

Where a cause was transmitted from Baltimore County Court to the Court of Chancery under the Act of 1824, ch. 196, the Chancellor properly viewed all the proceedings as having taken place in the same tribunal. *Strike vs. M'Donald*, 142.

REPLEVIN.

1. Though regularly a sheriff in taking goods under a writ of replevin, should summon the defendant according to the mandate of the writ, yet if he neglects to do so, and the defendant voluntarily appears in Court, and defends the suit, the omission by the sheriff to summon him is thereby cured. *Swann vs. Shemwell*, 207.
2. So where to a writ of replevin, the sheriff made no return, and an *alias* writ was issued, to which the sheriff made a return "*Eloigned*," and the plaintiff then sued out a *capias in withernam*, to which the sheriff returned, "replevied and delivered, as per schedule," and the defendant then appeared, pleaded to the plaintiff's declaration, and went to trial—*Held*, that it was too late for the defendant to object, that there was no return to the summons in the writ of replevin, nor day given him in Court. *Ib.*
3. A *capias in withernam* is not a proceeding in the replevin, but as a punishment on the taker or distrainer of the goods mentioned in the replevin, for his improper conduct in putting them out of the way, so that the replevin cannot be proceeded in. *Ib.*
4. If the defendant before the return of the *withernam*, appears to the writ of replevin, and offers to plead *non cepit*, it will stay the *withernam*, as he is not concluded by the return of an *elongavit*. *Ib.*
5. The only return which the sheriff can make, where the goods cannot be found, is "*Eloigned*." *Ib.*
6. Where the defence relied upon, was that the goods replevied were in the custody of the law, and the parties stated a case which showed, that the goods replevied had been levied on, but was silent as to the time of seizure, or whether at the time of the replevin from the officer who had levied on them, they were in his hands under a *fieri facias*—*Held*, that this might all be true, and still the goods not in the custody of the law. *Reeside vs. Fischer*, 235.

REPLEVIN.—*Continued.*

See DAMAGES, 2.

EVIDENCE, 1, 10, 23.

VERDICT, 4.

SALE.

1. It is a general and familiar principle, that there exists in every sale of personal property an implied warranty of title, and that the vendor cannot be a witness to sustain the title of his vendee. *Mockbee vs. Gardner*, 131.
2. Executors, administrators and other trustees, are exceptions to that rule, and a sale by them does not imply a warranty of title. *Ib.*
3. In sales by them, if fraud exists, or there is an express warranty and eviction, they would undoubtedly be personally answerable to a purchaser. *Ib.*
4. And in the case of a failure of title, while the purchase money for the property sold remained in their hands undistributed or unadministered, there would exist no well founded reason why they should not refund to a purchaser. *Ib.*
5. Executors, administrators and other trustees are competent witnesses for purchasers of personal property claiming under their sales; and if objected to, on the ground of special liability to their vendees, that objection must be proved by the party making it, before the Court will reject their evidence. *Ib.*
6. The Act of 1729, ch. 8, had for its object the suppression of secret sales; by demanding that transfers should be recorded, it was intended that notice should be given, that no one might be injured, or deluded, by secret and unknown conveyances. Its object then being to protect creditors from prior secret conveyances, any such creditor who had notice of any such incumbrance, could not be considered as falling within the class for whose benefit that Act was passed. *Hudson vs. Warner*, 310.

See DECEIT,

EQUITY, 31, 32, 33, 34, 35, 36, 42, 43, 44, 51.

EXECUTION, 3, 4, 6, 7.

MORTGAGE.

SCIRE FACIAS.

See JUDGMENT, 3.

SHERIFF.

See ACTION, 3.

EXECUTION.

REPLEVIN, 1, 2, 5.

SLANDER.

In an action on the case for slander, the plaintiff having proved the words as laid, may, for the purpose of showing the malice of the defendant, give in evidence the speaking of other slanderous words, of a similar import to those declared on, by the defendant of the plaintiff, before the bringing of the action. *Duvall vs. Griffith*, 24.

STATUTE OF FRAUDS.

See EVIDENCE, 23.

STATUTES.

I. BRITISH STATUTES.

7 Hen. VIII, c. 4. *Hopewell vs. Price*, 201.

21 Hen. VIII, c. 19. *Hopewell vs. Price*, 201.

II. ACTS OF ASSEMBLY.

1729, c. 8. *Hudson vs. Warner*, 310.

1763, c. 23. *Hollingsworth vs. Floyd*, 67.

1785, c. 72. *David vs. Grahame*, 73; *Strike vs. M'Donald*, 142.

1785, c. 80. *Brodess vs. Thompson*, 91.

1787, c. 9. *Munnikuyson vs. Dorsett*, 277; *State vs. Cox*, 288.

1794, c. 46. *Hopewell vs. Price*, 201.

1798, c. 101. *Seekamp vs. Hammer*, 8; *Brodess vs. Thompson*, 91; *Stewart vs. Riggin*, 87.

1809, c. 138. *State vs. Cassel*, 308.

1816, c. 221. *Brown vs. Brice*, 19.

1821, c. 217. *Berry vs. Scott*, 72.

1824, c. 196. *Strike vs. M'Donald*, 142.

SUPERSEDEAS.

See JUDGMENT.

SURETY.

1. By the Act of 1763, c. 23, a surety, on the payment of a judgment against his principal, is entitled to an assignment of the judgment from the legal plaintiff. *Hollingsworth vs. Floyd*, 67.

2. A surety on paying a judgment of his principal may in equity compel the creditor to assign the judgment with all liens given by the principal. *Ib.*

3. A payment in full by a surety has been adjudged of itself to operate as an assignment, so as to enable him to use the name of the creditor to recover the sum from his principal. *Ib.*

4. A payment of part of a debt by a surety does not entitle him to an assignment of the creditor's securities *pro tanto*. *Ib.*

See BOND, 4.

EQUITY, 26, 27.

EVIDENCE, 10.

JUDGMENT, 1.

LIMITATIONS, 2.

PLEADING, 14.

TAXES AND TAX COLLECTOR.

1. To entitle the collector of the County tax to recover in his own right, from a taxable inhabitant, the amount of his assessment, such collector must show that the taxes placed in his hands for collection, had been paid over to the persons in whose favor levies had been made, or adduce some proof, showing that he had furnished such evidence to the proper tribunal for adjusting his accounts. *Hammond vs. O'Hara*, 85.

2. The circumstance, that an account presented by a collector to the Levy Court, was by that Court filed in the clerk's office, is no evidence that the Levy Court adopted it. *Ib.*

TENANCY IN COMMON.

See WILLS, 5.

TOBACCO.

See PLEADING, 9, 10.

TRUSTS AND TRUSTEES.

1. D. and L. being infants and contemplating a marriage: the former (the intended wife,) being possessed of a large amount of United States stock, a few days before her marriage transferred the entire legal estate therein to trustees by deed, who were to permit her to receive during life the dividends and profits of the stock. She reserved no power over the principal, except the *jus disponendi* by last will and testament, to take effect in case she died without leaving a child or descendant. After their marriage and coming of age, on a bill filed by them against the trustees praying to modify the trust, by having a part of the trust funds invested under the direction of the husband in the purchase of a farm—*Held*, that whether the deed was valid or fraudulent, the Court could not change the trust; that if valid, it had given the parties no control over the principal fund, and a Court of equity did not possess any power to change and modify trusts contrary to the manifest intention of the deeds creating them; or if a fraud on the rights of the intended husband, though the Court might set the deed aside, yet it could make no terms with a fraudulent instrument. *Lowry vs. Tiernan*, 27.
2. Where trustees appointed by a last will for the sale of real estate refused to act, J. was appointed by the Chancellor in their place, and having sold the estate, he claimed a commission for his trouble; but it appearing that he had waived all claim to commissions anterior to his appointment, and by a family arrangement, in which he was concerned, he was procured to be appointed trustee, on the express agreement that no commissions were to be charged—*Held*, that he was not entitled to any commission, but only to his actual expenses incurred in the execution of the trust. *Ridgely vs. Gittings*, 45.

See BANKRUPTCY AND INSOLVENCY, 1.

EQUITY, 16, 28, 29, 34, 42, 50.

MORTGAGE, 2.

SALE, 2, 3, 4, 5.

USURY.

A loan at par of bank notes passing at from 2 to 5 per cent. discount, unexplained by circumstances, would be usurious; but where the borrower was at liberty to return them to the lender at their par value, and so exempt himself from loss, such a transaction would not be deemed usurious, unless that privilege was a mere cover to cloak a usurious design. *Caton vs. Shaw*, 11.

VERDICT.

1. A verdict may be varied from at any time before it is recorded. *Ede-len vs. Thompson*, 25.
2. A sealed or privy verdict may be varied from in open Court. *Ib.*
3. So, where the parties agreed that the jury might give their verdict to the clerk of the Court after the adjournment for the day, and the jury having signed and sealed a verdict delivered it to him, but on being called at the bar the next morning, before it was recorded,

VERDICT.—*Continued.*

they were sent back to their chamber by the Court to correct it, as it did not determine the issues joined in the cause to their full extent, and they found a new verdict which did. It was *held*, that the first verdict might be compared to one received by a single Judge out of Court, or to a sealed verdict retained by the foreman of the jury in his pocket, in neither of which cases is the verdict binding upon the jury, but is liable to be changed and varied from by them in open Court, and that a judgment entered on the second verdict was correct. *Ib.*

4. In an action of replevin, where the defendant pleaded *non cepit*, property in himself, and in strangers to the suit, on all of which questions issues were made up, and the jury, as to part of the property, found for the plaintiff, and as to the residue for the defendant—*Held*, they were warranted in so finding; that however contradictory those issues seem to be, they are made from pleas not deemed incompatible; and while they are admitted to be pleaded together, every result from their use ought surely to have the countenance and support of the Court. *Ib.*

WAIVER.

See EQUITY, 8.

WARRANTY.

1. Warranties on the sales of personal property have usually been divided into two classes, express and implied. *Osgood vs. Lewis*, 363.
2. To create an express warranty, the word warrant need not be used, nor is any precise form of expression required; any affirmation of the quality or condition of the thing sold, (not uttered as matter of opinion, or belief,) made by the seller at the time of sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty. *Ib.*
3. In cases of oral contracts it is the province of the jury to decide upon the existence of the ingredients necessary to constitute a warranty. *Ib.*
4. But in cases of written contracts, whether the instrument contain an express warranty or not, the Court must determine. *Ib.*
5. Implied warranties arise by operation of law; they exist without any intention of the seller to create them, and may properly be divided into two kinds. *Ib.*
6. The one is untinctured by actual fraud or deceit, as the warranty of title, that provisions purchased for domestic use are wholesome—and in executory contracts, or where the purchaser had no opportunity of inspection, that the article contracted for shall be saleable as such in the market. *Ib.*
7. Other implied warranties are where fraud and deceit are of their very essence, as in cases where the seller of any article knowing of its unsoundness, uses any disguise or artifice to conceal it, or represents it, (whether in the way of expressing opinion, or belief, or otherwise,) to be exempt from such defect. *Ib.*
8. Implied warranties are not conclusions or inferences of fact drawn by a jury, but conclusions of law pronounced by the Court abso-

WARRANTY.—*Continued.*

lutely, upon facts admitted or proved before the jury, or hypothetically, where the facts are controverted. *Ib.*

9. In actions on the case upon implied warranties, where the knowledge of the defendant is not an essential ingredient of the plaintiff's right of action, it need not be alleged nor proved. *Ib.*
10. The statement in a bill of parcels for a quantity of oil, that it was "winter pressed sperm oil," is an express warranty by the vendor, that such oil was winter pressed. *Ib.*

See PLEADING, 22.

SALE, 1, 2, 3, 4.

WILLS.

1. A devise of negroes to T. his heirs and assigns, and "if the said T. should die without heirs of his body lawfully begotten, or before he shall arrive unto the full age of 21 years, then to A." &c. is good by way of executory devise to A; the word *or* in this limitation being construed to mean *and*. *Raborg vs. Hammond*, 32.
2. In the judicial interpretation of wills, the intention of the testator is to be gathered from the entire instrument, and prevails, unless it violates some established principle of law. *Dashiell vs. Dashiell*, 95.
3. Executory devises and bequests are valid, where they must take effect, if at all, within a life or lives in being, and twenty-one years and the fraction of a year afterwards. *Ib.*
4. In the case of a bequest of personal property, the Courts are always studiously anxious to effectuate the intention of the testator, and will lay hold of the smallest circumstance to limit a failure of issue. (where such property is devised upon that contingency.) to the death of the first taker, so as to make the limitation over, good as an executory devise. *Ib.*
5. Where it was held that a certain limitation over in a will was a good executory bequest to the heirs of the testator, who were such at the time of his death; and that they were entitled to the property bequeathed to them, as tenants in common. *Ib.*
6. A testator, the owner of a large tract of land, devised a part thereof as follows: "beginning at my first bounded tree, running down Zachia Swamp to a branch"—*Held*, that in the location of this devise, the point of intersection of the branch, intended by the testator, was the mouth thereof. *Middleton vs. Dyer*, 341.

See ESTATES FOR LIFE.

EVIDENCE, 1.

NEGROES AND SLAVES.





REPORTS

OF

CASES ARGUED AND ADJUDGED

IN THE

Court of Appeals of Maryland,

AND IN THE

HIGH COURT OF CHANCERY OF MARYLAND,

FROM

FIRST HARRIS & MCHENRY'S REPORTS TO FIRST
MARYLAND REPORTS.

ANNOTATED BY

WILLIAM. T. BRANTLY,

OF THE BALTIMORE BAR.

VOLUME XIV.

CONTAINING THE FIRST VOLUME OF GILL & JOHNSON'S REPORTS.

BALTIMORE:

M. CURLANDER,

LAW BOOKSELLER, PUBLISHER AND IMPORTER.

1884.

References in the notes to preceding volumes of Maryland Reports are made to the pages of this edition.

The Index and Table of Cases in each volume of this series after 1 H. & J. have been prepared by Mr. W. H. BRUNE, JR., of the Baltimore Bar.

This volume, containing cases determined in the Court of Appeals of Maryland in 1829, and reported by Richard W. Gill, Attorney-at-Law, and John Johnson, Clerk of the Court of Appeals, was first published at Baltimore, by Fielding Lucas, Jr., in 1830.

BALTIMORE:
WM. K. BOYLE & SON,
PRINTERS.

NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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Hon. RICHARD TILGHMAN EARLE, Judge.
Hon. WILLIAM BOND MARTIN, Judge.
Hon. JOHN STEPHEN, Judge.
Hon. STEVENSON ARCHER, Judge.
Hon. THOMAS BEALE DORSEY, Judge.

COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

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Saint Mary's, Charles and Prince George's Counties.

Hon. JOHN STEPHEN, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. JOHN ROUSBY PLATER, Associate Judge.

SECOND JUDICIAL DISTRICT.

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THIRD JUDICIAL DISTRICT.

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Hon. CHARLES J. KILGOUR, Associate Judge.
Hon. THOMAS H. WILKINSON, “ “

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Hon. ARA SPENCE, Associate Judge.

Hon. WILLIAM TINGLE “ “

FIFTH JUDICIAL DISTRICT.

Frederick, Washington and Allegany Counties.

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Hon. ABRAHAM SHRIVER, Associate Judge.

Hon. THOMAS BUCHANAN, “ “

SIXTH JUDICIAL DISTRICT.

Baltimore and Harford Counties.

Hon. STEVENSON ARCHER, Chief Judge.

Hon. CHARLES W. HANSON, Associate Judge.

Hon. THOMAS KELL, “ “

BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.

Hon. WILLIAM MCMECHEN, Associate Judge.

Hon. ALEXANDER NISBET, “ “

ATTORNEY-GENERAL.

ROGER B. TANEY, Esquire.

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WARRANTY.—*Continued.*

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9. In actions on the case upon implied warranties, where the knowledge of the defendant is not an essential ingredient of the plaintiff's right of action, it need not be alleged nor proved. *Ib.*
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See ESTATES FOR LIFE.

EVIDENCE, 1.

NEGROES AND SLAVES.





before you take the copper on board, because every pound so discharged, enables you to put in place thereof a pound of copper. Since writing the above, on examining letters from Chili, dated in January last, it appears there is a paper currency, depreciated in its value—this being the case, and that this depreciated paper is payable and receivable for the products of the country, I say, if this is the case, much benefit might be made by selling the doubloons for the paper money; but you might find that with the coin you could even do better to purchase, and pay in it, than to first sell your coin for the depreciated currency, and to purchase and pay with it. In all these points, you are to make your estimates and calculations. About two years since, I sent my schooner *Midas*, Capt. Dickinson, with Edward M'Clure, supercargo, who loaded the schooner at Coquimbo, with copper, and dispatched her to me. M'Clure remained at Valparaiso, to dispose of a part of the outward cargo then unsold, and close the entire business of the voyage. He would certainly be there until the month of September, and he may still be at Valparaiso on your arrival at Coquimbo. Should you see him, and he has any

5 funds of mine, or * that he has departed from thence, and you find he has placed any of my property in the hands of any person there, in either case, I authorize and empower you to receive and carry it with you, either in copper or Spanish dollars, of the old coin. Mr. Richard R. Boughan, residing at Valparaiso, will give you every information in relation to the affairs of M'Clure, should he have left that country before you arrive. Boughan ought to have property of mine in his hands from a former transaction, which I authorize you to receive from him also. Boughan may be able to give you useful information. Be particular in the purchase of every article in Canton, to have them, of the very best quality, and more particularly that the teas are so. To prevent misunderstanding, I deem it necessary to state your compensation to be the two thousand dollars, payable on your return, with a privilege from Canton, not to exceed twenty-five tons, but it is to be understood that you are not to put any copper or heavy article on board at Chili, as my views are that you completely load her there with copper, and that only for my account. After my property and your privilege are on board, and the ship should not be full, if freight offers deliverable here, you will accept it.

“Should you fail in procuring copper at Chili, you will proceed in the ship with the doubloons direct to Batavia, where they are rated as high as in Chili, and with them purchase an entire cargo of coffee, which will require with proper storage from 8,500 to 9,000 picols. This quantity was brought in her by Captain Munu, but she was full in every part. Do not purchase a picol of sugar; and should your funds prove insufficient to fill her, I authorize you to draw bills for my account on Messrs. Baring, Brothers & Co. of London, or on Messrs. Hope & Co. of Amsterdam. When you complete your business in Batavia, you will proceed from thence direct to this port.

In stating your privilege, it is to be understood the twenty-five tons, are measurement, and if in weighty articles, twenty-five thousand pounds."

The other dated Baltimore, the 26th December, 1819, from the defendant to the plaintiffs' intestate, viz:

* "I think it is probable you are this day in London, notwithstanding I have concluded to address you, and to take 6 the chance of its reaching you before you depart from thence. The object is to state to you, that from mature reflection, supported by various calculations, resulting in a conviction that the voyage will turn out to better advantage by returning direct from the coast of Chili to Baltimore with copper, than to proceed with it from thence to Canton, as originally intended. I need not remark to you the great difficulty and delay (and without an adequate profit) of realizing a Canton cargo in this market. It is not to be accomplished, and I would consequently be compelled to send it from hence to Europe, where no gain can be calculated upon. I therefore revoke and countermand the orders I gave to you to proceed from Chili to Canton, and now substitute that you will return with the ship and cargo of copper direct from the coast of Chili to Baltimore. As relates to the investment and disposal of your own funds, you must use your own discretion by investing it in copper or any thing else, and bringing it with you in the ship—the copper may (as I hope it will) be bought on terms that will, with my funds and yours, load the ship very deep, but if necessary you must load her very deep, Should you fail in getting copper on the coast of Chili, you will immediately, on finding it so, proceed from thence to Samarang, in the Island of Java, and there invest my funds and your own in coffee, (no other article of the produce of the Island will answer) and proceed from thence direct to Baltimore. The Government of Batavia may object to your loading at Samarang, being an out port, but you must use every means in your power to obtain from the government a permission, as you will be able to put on board coffee at Samarang, two or three dollars pr. picol less than at Batavia."

The plaintiffs also offered in evidence that the ship Chesapeake, at the date of the said letter, and before, was owned by Donnell, who continued to be the owner of the said ship during the voyage herein-after mentioned, and until and after her return to Baltimore, as hereinafter stated—that Pawson, now deceased, was master and super-cargo of the said ship, at the date * of the said letter, and so 7 continued until his death at Coquimbo, as hereinafter mentioned. That the said vessel sailed on the said voyage from the port of Baltimore, November 19th, 1819, and arrived at London, January 25th, 1820. That she sailed on the 4th day of May, 1820, from London for Coquimbo, and arrived there on the 15th of August, 1820, and sailed from Coquimbo for Guasco in January 19, 1821, arrived at Guasco, January 21, 1821, and continued there until Jan-

uary 29, 1821, when she sailed for Baltimore. That, after being out only six hours, the ship sprung a leak, and put back to Guasco, where she remained until February 7, 1821, when she sailed for Coquimbo, and remained there until July 9, 1821, when she sailed for Valparaiso, where she arrived on the 12th July, 1821, and remained there until the 19th of that month, when she sailed for Baltimore, where she arrived October 1, 1821. That Pawson died at Coquimbo, December 4th, 1820, when the mate, Thomas A. Lane, took charge of the ship, and continued master and commander until she returned to Baltimore, as above stated.

The plaintiffs then offered and read in evidence, the following letters and papers, which were admitted to be in the hand-writing of the respective parties thereto, viz: A letter from the plaintiffs' intestate to the defendant, dated London, the 7th of February, 1820.

"After a very long and fatiguing passage, I arrived in the river on the 23d ult. without any material damage. In consequence of our ship's heavy draught of water, we were delayed several days in getting up. We are now about two-thirds discharged, and proceeding with all possible despatch. As the ship wants caulking in the bends and upperworks, and a new beam in her (one of them being broken entirely off) I have concluded to put her into a dry dock where it can be done with more despatch and facility, and will not increase the expense above £5, and it will afford a cheap opportunity to examine her bottom, as the copper may have been injured when she lost her rudder. I am sorry to find that doubloons cannot be got at the price you contemplated, and that the quantity cannot be

8 procured in London—they have only yet got about one-third of *the number wanted, but have no doubt they can be obtained from France and Holland, they, by the last accounts from Paris, are quoted lower than they cost here, from which circumstance Mr. Horstman thinks they are plenty there—the price here is 75 1-6 per oz.

"I have had the pleasure to receive your letter of the 26th December, in which you are pleased to alter the original intention of the voyage, which will be cheerfully and strictly attended to, and if on my arrival at Chili, I should find it necessary to proceed to the Island of Java, no exertions shall be wanting to have your wishes fulfilled in getting the cargo of coffee only at Samarang."

Another letter from the plaintiffs' intestate to the defendant, dated London, the 27th of April, 1820.

"On the 24th inst. Mr. Horstman addressed a letter to me, stating that in consequence of the advanced price of doubloons, and the probability that the flour would not produce so great a sum as you calculated on, the funds you had provided him with, would not be sufficient to fulfil your order in the purchase of the eight thousand doubloons which I am directed to receive from him, and requested me to state in writing what I thought best to be done. In answer,

to which I wrote him that in my opinion had you foreseen or supposed any deficiency such as above mentioned, you would not have ordered a less quantity of doubloons but would have made the requisite provision to obtain the full quantity of eight thousand. I was the further confirmed in this opinion by reflecting that your only object in sending the ship to London was to obtain the doubloons, and to be disappointed therein would frustrate the ultimate object of the voyage you had in view. I was, therefore, clearly of the opinion that you would expect him to supply the deficiency (which was about 950 doubloons) so that your ship might proceed without further delay. With this answer he was satisfied, and continued the purchase, and has now ready 7,650 doubloons, leaving a deficiency of 350, which he thinks can be obtained in one or two days. Under these circumstances, we have fixed on the first day of May for the departure of the ship, with *determination of taking what may then be deficient, in dollars, rather than incur further expense by delay. In consequence of the scarcity of doubloons, I have thought it advisable to invest my own funds in merchandise, in hopes that it may do as well, and because I would not interfere in any manner with your business, I therefore request that you will effect insurance from hence to Coquimbo, on the following merchandise and amount: 1 bale 8 cases British piece goods," &c. the whole amounting, with commission, &c. to £1,115 13 3. 9

"I shall send copies of the invoices to my family, in case they should be necessary. The circumstance of the crew nearly all running away, after I had paid them the month's advance they were to receive here, and my being obliged to advance others two months' pay, this long and unavoidable detention, and the great necessities of the ship in sails, cables, &c. which was indispensable for the voyage, has added greatly to the disbursements, the bills of which Mr. Horstman will forward to you; but being now supplied, I shall be careful to keep the expenses for the remainder of the voyage, as low as possible, which I trust will appear to your satisfaction in the event."

A letter from Horstman to the plaintiffs' intestate, dated London, the 24th of April, 1820.

"You have been verbally acquainted by me of the difficulties which have arisen since Mr. John Donnell despatched the Chesapeake to my address with a cargo of flour, and with order to invest the proceeds, and a credit of £21,000, on Messrs. Varkevessar, Derrapool & Brown, of Rotterdam, in the purchase of 8,000 doubloons.

"You are aware that the literal execution of this order has become impossible by circumstances. You know that of the flour I have only been able to sell about 700 bbls. and that the remainder remains on my hands—that I cannot, for the present, sell it, and that the ultimate proceeds of the 4,721 bbls. is uncertain. You have been eye-witness of the impossibility of getting the doubloons otherwise

than gradually, and this part of the business has only lately taken a turn by the unexpected arrival of about 1,600 doubloons from the

10 Mediterranean, and think the * remainder, (about 900) or very near, may now be had. But the £21,000, and the amount of the 700 bbls. which are sold, are not, by far, sufficient for the draft of Mr. Donnell for £1,160, to your order, together with the ship's expenses, and the cost of the 8,000 doubloons; and if you judge that, under all the circumstances of the case, it is necessary for Mr. Donnell's interest that the deficiency be supplied by me to make up the 8,000 doubloons, I am ready to do so, in order to get the vessel away immediately, and to furthering Mr. Donnell's ulterior views in this affair. You will therefore please to say, in writing, what you deem to be for Mr. Donnell's interest, and what you wish me to do."

A letter from the plaintiffs' intestate to Horstman, dated London, the 24th of April, 1820.

"Understanding from you that there is a deficiency in the means Mr. Donnell has placed in your hands, in order to supply the eight thousand doubloons, I am directed by him to receive from you, which deficiency, it appears, arises from the doubloons being at a more advanced price than he had contemplated, and from the probability that the Chesapeake's cargo of flour, which you hold for sale on his account, not producing so great a sum as he calculated on, I have to state to you, as my decided opinion, that had Mr. Donnell foreseen or supposed any deficiency, such as above mentioned, he would not have ordered a less quantity of doubloons, but would have made the requisite provision by enlarging the means he has placed at your disposal, so as to supply the full quantity of 8,000 doubloons. I am the further confirmed in this opinion, by the knowledge that the grand object of the voyage he has in view for the Chesapeake, depends entirely on obtaining the requisite funds in London, (say the eight thousand doubloons) to accomplish which was Mr. Donnell's only object in sending the ship to London. I am therefore clearly of opinion, that Mr. Donnell will not only expect, but esteem it a favor, that you supply that deficiency for his account as soon as possible, so that his ship may, without further delay, proceed on

11 her * voyage, and I am confident he will hold himself responsible for the transaction."

A letter from the plaintiffs' intestate to the defendant, dated London, the 27th of April, 1820.

"I am happy to inform you, that after a very long and tedious delay, Mr. Horstman has at length nearly completed your order for the doubloons, having now already purchased 7,650. We have fixed the first day of May for the departure of the ship, and if the remainder of the doubloons cannot be purchased in time, we have determined, rather than incur any further delay, to take the amount in dollars."

[This letter then incorporates a copy of the previous letter of same date.]

"May 3d. Since writing the above, we have completed the quantity, and shall proceed on board to-morrow morning. There is a ship just arrived from Chili, by which I learn indirectly, there is a great probability of our accomplishing our object there. Mr. Horstman will transmit to you the duplicates of the bills for the ship's outfits, which, together with the enclosed, (which accounts for the cash received from him,) will shew the whole amount. I have one passenger, who has paid £100, one-half of which I have paid for stores, and divided the other between myself and the ship, which you find credited on the enclosed."

Another letter from the plaintiffs' intestate to the defendant, dated Coquimbo the 15th of August, 1820.

"I arrived here on the 13th inst. after a passage of ninety-three days, all well. I have not yet been able to collect sufficient information to act decisively with respect to loading, and shall not determine until I have heard from St. Jago and Valparaiso, whither I have written to Mr. Boughan, and Mr. M'Clure, (who I understand is yet in this country,) for that purpose; the information I get here is, that about 6,000 quintals of copper may be got immediately here, and at Guasco, a port a little way to the northward of this, and that I could complete the quantity as far as my funds would go, in the course of three months; the price is said to be somewhat lower than hitherto, * and I think may be bought for \$12, and will stand 12 on board at about \$14, or 14½, with the duties paid. I believe, however, that something may be done to save a part of the duties; the doubloons are worth \$17½ as you supposed, and 8,000 amount to \$138,000, which will put on board at the above price, upwards of 9,600 quintals, or 998,400 lbs. and valuing that quantity at 20 cents, and the doubloons at cost, I am of the opinion will yield a better result than continuing the voyage to Batavia; but as there is no ship here wanting copper, I shall not commence the purchase until I make myself better acquainted on the subject, and until I am certain of getting the whole quantity. With respect to the depreciated paper currency you mention in your instructions to me, I find it only receivable by the government in payment for duties, and only for half the amount, they requiring the other half in cash: it may be bought at a discount of twenty per cent. which advantage I shall not neglect to avail myself of. I have not yet learned any thing concerning the state of your business here, under the superintendence of Messrs. Boughan and M'Clure, but shall take the earliest opportunity of forwarding to you whatever I may learn on the subject."

Another letter from the plaintiffs' intestate to the defendant, dated Coquimbo, August 24, 1820,

"Since writing you on the 15th inst. stating that 6,000 quintals of copper might be immediately secured; and our whole cargo contracted to be delivered in three months, I have concluded to load here, and hope that it may meet your views and approbation. So

large a quantity of copper as I want, cannot ever be procured here at once, and from what I learn from the best authority there has never been a more favorable opportunity than the present, for obtaining so large a quantity. I have therefore thought it most prudent, and have accordingly secured the 6,000 quintals at \$12, and have every prospect of getting the balance at the same price, and in the time above mentioned. The copper, at this price, will stand, on board, duties paid, at \$14, 14½–100. The value of the doubloons are \$17½,

13 and with the funds I have, will put on board upwards of 9,600 * quintals. Mr. Boughan writes me that he has not made any collections for your account, and indeed, says there is very little probability of his ever doing so. He has instituted a law suit against the debtor, who he says is so poor that he does not expect any thing from him, even if he is cast; he speaks also, of great difficulties he has had in ascertaining the amount of the debt, in consequence of some necessary books or papers having been destroyed in the revolutionary wars of this country. Upon the whole, there is very little prospect of getting any thing from him. I have not yet received any communication from Mr. M'Clure, (who is married at Santiago) but Mr. Boughan informs me that he believes Mr. M'Clure holds some government paper for your account, and if this intelligence is confirmed, my purchasing copper here offers a favorable opportunity of making use of it to advantage, as it is at twenty per cent. discount, but will be received at par by the government, in payment for half the amount of duties, but the other half must be paid in cash—this arrangement will also increase the quantity of copper, if effected. In my former letter, I informed you that the government here had issued orders that have a direct tendency to encourage desertion of seamen from our ships, in consequence of which I have shared the fate of several others by losing sixteen of my crew, which entirely disables me from proceeding in the discharge and loading my ship—they are now on board one of their brigs of war, and unless Captain Downes arrives here this evening, as we expect he will, they will succeed in carrying them off. I think, however, that if Captain Downes should not arrive time enough to prevent this diabolical proceeding, that he will no doubt give me a crew from the frigate."

"Account sales of sundries made by Edwards & Stewart to the government of Chili, for account of Captain John C. Pawson, ship Chesapeake. August 25, 1820. 45 coils cordage, weighing 113 qrs. 87 lbs. a \$20, \$2,277.03½—and one day and night glass, \$30, amounting in the whole, after deducting \$92.02 for commissions, to \$2,215.01½."

14 * A letter from the plaintiffs' intestate to Lemuel Goddard, dated Coquimbo, the 25th of August, 1820.

"Above you have the account sales of the cordage you shipped on board the Chesapeake, which you will perceive I have obtained a good price for. I also sold the spy glass, but the foul air extractor

and the compass yet remain on hand, without any probability of selling them, and if I am obliged to take them to the United States, shall deliver them to your order there. My principal object in addressing you now, is to give you an opportunity to make insurance on the amount of your interest in the above transaction. This I think the more advisable, because a chance now offers for conveyance to England, and it is quite uncertain if I shall have an opportunity to write to the United States for insurance. Our interest, as per agreement, stands thus: Net amount of sales, \$2,215.01½. Deduct cost and charges per invoice, \$1,232.01½—leaving \$983.00½—One-half of which is \$496.04½. Which added to the original costs and charges, \$1,232.01, makes \$1,728.05½.

“Which sum, say \$1,728.05½, I leave you to get insured from hence direct to Baltimore, where, on the safe arrival of the funds, I hold myself responsible to pay said amount to your order. It was a mere chance I was enabled to get so good a price for the cordage. The fleet from Valparaiso on the way to attack Lima, put in here, and was very much in want of it, or I fear we should have a poor account of it, and I would advise you not to let our present success induce you to ship any quantity of cordage to this country, as the probability is, it would not sell.”

A letter from the plaintiffs' intestate to Edwards & Stewart, dated at Coquimbo the 19th of August, 1820.

“In consequence of the representation made by you that six thousand quintals of copper might be immediately bought at \$12 per quintal, and your decided opinion that the balance of my cargo may be contracted for at the same price, to be delivered on the first of November, I have determined to load my ship here, and hereby authorize you to purchase the 6,000 quintals, and secure the remainder, amounting to between three and * four thousand quintals with all possible despatch, on the terms above men- 15
tioned, or lower if possible. In making these contracts, I would recommend your particular attention to have them only with men in whom you have perfect confidence, both as to the quality of the copper and to the punctuality of the delivery. It is understood that you secure to me the just and true performance of the said contracts, so that I shall not meet with material delay to my ship. It is also agreed that you are to receive two and a half per cent. commission, and one per cent. storage, amounting to three and a half per cent. on the amount of the purchase. I must also request your particular care and attention to secure every advantage that can be obtained in weighing the copper and in paying the charges and duties. It is also understood that you are not to purchase copper for any other order, until my cargo is completed.

“Understand that the two and a half per cent. is on the amount of the invoice, and the one per cent. on the amount of the copper at first cost, exclusive of duties and other charges.”

A letter from Edwards & Stewart to the plaintiffs' intestate, dated Coquimbo, the 4th of September, 1820.

"We have received your letter of this date, in which you request our purchasing for your account from 9 to 10,000 quintals of copper, at or under \$12 per quintal. Agreeably to verbal information given you by us, that we thought 6,000 quintals might be secured much before the time limited, we have now the pleasure of confirming it by enclosing you herewith, our obligation at sight, for said amount, say six thousand quintals copper, which you may dispose of when you judge most proper. As regards the residue of your order, although we cannot come under an obligation for its purchase, yet we think our success will be almost certain from information we have, and a pledge we make you on not purchasing on any other order until yours is completed—on this point we can say no more. We accept the commissions as stated by you, two and one-half per cent. on costs and charges, and one per cent. on storage on the amount of the purchase of the copper. All contracts made by us come under our responsibility, not only as to the faithful * delivery, but likewise
16 as to the quantity of the copper. All copper received is weighed by us in person, and every regard is paid to this branch that the interest of the concern requires."

A letter from the plaintiffs' intestate to the defendant, dated Coquimbo, the 4th of September, 1820.

"I have to inform you that your business remains nearly in the same state as when I wrote you on the 24th ult. viz. that I have purchased 6,000 quintals of copper, and shall have the remainder, amounting to between three and four thousand quintals, ready by the first of November, at \$12 per quintal, which, with the duties and shipping charges paid, will stand on board at about \$14 more or less. In this transaction I was determined by reflecting that a pound of copper at that price, would nett in the United States, as much profit, and with more certainty, than a pound of coffee, and that the additional expense of pursuing the voyage further would be saved, and I trust that this view of the subject will meet your approbation. I have not yet received any communication from Mr. M'Clure respecting your property in his hands, nor can I give you any certain information, except that I have understood that he had invested the government paper which he held in silks, a part of which he sent down the coast for sale, and the remainder he had deposited in this place, but has recently ordered them somewhere else. I shall use my best endeavors to have a settlement with him, if possible, but I think there is no chance whatever, of getting anything from Mr. Boughan. I am yet without a crew: in consequence of the Macedonian having a long passage from Valparaiso to this place, Cochrane had time to carry off the men, and Captain Downes would not supply me from the frigate, as he thought there was a probability of his having some trouble with Cochrane, if he should attempt to obstruct his entrance

into Lima. He has taken a list of the deserters, and intends to demand them. Understanding that there are plenty of seamen in Valparaiso, I have written to the consul there, requesting him to procure me a crew, and send them down by the first opportunity, so that I am in hopes of soon being able to proceed with loading, and shall use every * exertion for dispatch in my power. As I may possib'y not have another opportunity, direct to the United States shortly, I would thank you when you make insurance on the ship and cargo, also to insure for my account, the same sum which you did me favor to insure from London here. I think it probable it will be shipped in silver bullion and copper. As it is necessary to have some light and bulky article to stow with the copper, in order to raise it in the hold as much as possible, I have purchased for that purpose a few hundred hides, and shall increase the quantity to one thousand, if they can be obtained—they cost from 9 to 12 rials per hide, and will average about 28 lbs. It is usual to purchase wood for this purpose, which is attended with considerable expense and trouble, and is afterwards worth nothing, while the hides at the above price would pay a good freight. I have employed Messrs. Edwards & Stewart, of this place, as agents to purchase the Chesapeake's cargo, of whose integrity and honesty as merchants, I made myself perfectly satisfied of before I engaged with them; their influence with the Governor and Collector here is very great, from which circumstance I expect great advantages in the payment of the duties, and I have a good prospect of getting through my business without trouble or delay. 17

“Since writing the above, I have received a letter from Mr. M'Clure; he says he has on hand a quantity of silks, which, with the discount on government paper, (with which I understand he paid for them,) cost about \$5,000, and a few other articles which would raise the amount to 1,000 more; he has also from 2,000 to \$2,500 in cash, which he promises to put immediately at my disposal; he also offers to make an immediate sale of the silks, &c. for cash and close the concern, if I will authorize him to do so, but it is his opinion, that to force a sale of the silks, &c. for that purpose would be attended with a loss of at least one-half, and as I am only empowered by you to receive whatever he may give me, I must leave him to exercise his own discretion with respect to selling the silks, &c. but strongly recommend him to effect a settlement, if possible, * while the Chesapeake remains here, as I am convinced you are anxious to have it closed.” 18

Another letter from the plaintiffs' intestate to the defendant, dated Coquimbo, the 4th of November, 1820.

“By the Two Catherine I informed you that I had commenced the purchase of the Chesapeake's cargo of copper, at \$12 per quintal, which will cost on board, duties paid, about \$14½, depending considerably on the amount of that saved by the arrangement with the

collector here, and a gain of from five to seven per cent. on the amount of the duties, by paying part of them with the government paper, which is at a discount, though so uncertain that it is dangerous to purchase it until the moment it is to be paid into the custom-house. There is now purchased for your account 9,500 quintals, nearly 7,000 of which is on board, and the remainder in Guasco, whither I shall proceed and take it in as soon as I get my crew from Valparaiso, which I am daily in expectation of, and hope, in about a month more, to be on my passage for Baltimore. We have received accounts here stating that the United States had proceeded to take possession of the Floridas, and had acknowledged the independence of this country and Buenos Ayres. If so, I think it quite likely that a war with Spain must ensue, and of course render me liable to capture on the homeward passage, by privateers under Spanish colors. Of the truth of this I hope soon to be informed, and if it is the case, I shall endeavor to sail home in company with the Macedonian, which ship is shortly expected here from Lima, and is to proceed immediately home. I have received from Mr. M'Clure the sum of \$5,500 on your account, to obtain which, he informs me, he sold the greater part of the silks, which in a former letter I mentioned he held, at a great loss; he writes me also, that he intends, if possible, to sell the remainder and close the business, though I cannot inform you to what amount he still holds. I wrote him a few days ago to inform him that I expected to sail shortly, that he might make his arrangements accordingly. I have got nothing from Mr. Boughan, nor do I think there is any probability that I shall. He writes me that he is paying every attention to the suit he has instituted

19 * against the consignee of the Melanthro, and has great hopes, from the strong vouchers he has presented, of gaining the cause, but if he does, he has no hopes of recovering any money, from the circumstance of the consignee being very poor. With respect to loading the ship, I have paid every attention to have the copper of the best quality, and stowed in the safest manner, but I think it altogether unsafe to put more than 9,500 to 10,000 quintals on board, as it is a very laborious cargo from its dead weight and small bulk, and the ship begins now to show her age. I have purchased about 600 hides, which cost from nine to twelve rials each, to stow with it, for the purpose of raising the weight and increasing the bulk. I shall, however, be guided by my judgment as the ship comes down in the water, and if possible, bring the whole of your funds in copper. If there should be any surplus funds, which will not be more than the \$5,500 received from Mr. M'Clure, I shall bring it in Plata Pina, or silver in bars, the former at \$7 56-100, and the latter \$7 81-100 per mark of 8 ozs. In my former letters I requested you to insure for my account the sum of \$5,000. I now have to request you will insure \$1,000 more. If I find the ship too heavy laden with your copper, I shall curtail my privilege in that article, and

bring my funds in silver. I send this across the Cordilleras, but I understand there is very little hope of your receiving it, as the communication is very much interrupted by banditti."

A letter from Horstman to one of the plaintiffs, dated London, the 29th of July, 1822.

"I have to acknowledge your letter of the 18th May, in which you request to be furnished with a copy of the account between the late Captain Pawson and myself, and such documents as would enable you to come to a settlement, as acting administrator, with Mr. Donnell. In reply I beg to state, that I had not any account running with Captain Pawson, as he acted entirely himself; but on reference to my books, I find the following items were paid by me, and repaid by Captain Pawson, the 19th April, viz: Barry, for charts, &c. amounting to * £69 1 2, which were the only pecuniary transactions with him direct. 20

"In regard to the bills of disbursements of the ship Chesapeake, which you mention were never received by Mr. Donnell, I find that I sent to Mr. Donnell on the 13th of May, 1820, the following, viz: One letter, 13th May, with account of disbursements of the Chesapeake, £2,219 13, and a list of the vouchers;—one parcel, containing the vouchers, (original accounts)—one letter from Captain Pawson to Mr. Donnell—two letters from Captain Pawson to different persons, (I think Captain Hamilton and Mrs. Pawson.) These were sent to Liverpool for the purpose of being forwarded, and I find by letter from Liverpool that were sent per the Mary, which sailed the 15th of May, with the exception of one addressed to Mr. Donnell, which were sent per the Anna Maria, (the latter is presumed to be the one containing the vouchers.) From Mr. Donnell I have received no other letter than of the 18th of November, 1819, brought by Captain Pawson, and 26th of December, 1819, enclosing a letter for Captain Pawson. Captain Pawson had a bill on me, drawn by Mr. Donnell, for £1,165 9 1, at sixty days, which was due 30th of March, 1819, and paid to him. I hope these details will answer your purpose."

A letter from Edwards & Stewart to the defendant, dated Coquimbo the 8th of December, 1820.

"With sincere regret we have to inform you of the death of our much lamented friend, Captain John C. Pawson, who departed this life on the fourth of the present month; to us it is particularly sensible, in consequence of his being, from the first of his attack, until his decease, in a state of torpidity, from the nature and violence of his disorder, which prevented our making any arrangements with him in relation to his affairs at this place. We attribute, as the principal cause of Captain Pawson's death, his extreme anxiety on the subject of his crew, the receiving of which he had placed great reliance by a ship which arrived a few days before his decease, from Valparaiso, to which place he had written to a mutual friend, to ship

him a crew, having lost by desertion the day after his arrival at this
 * port. We were much disappointed at hearing that no men

21 were to be found at Valparaiso, from the great enlistments made by the navy agent for the Chilian navy, which left us the only and very uncertain resource, of Captain Downes supplying him with a quota sufficient for taking the ship home. Captain Downes' arrival was at that time daily expected, but an arrival from the coast of Peru, where the Macedonian had gone, brought us sad intelligence of Captain Downes not being able to visit this part of the coast for some months. This news created in Captain Pawson a very sensible change in his state of health, which had been delicate from his arrival, by great depression of spirits, which was accompanied by a fever, which changed into the gout, entered the stomach, and after being confined four days to his bed, yielded to his Maker the debt of nature, and trust he is enjoying, through the medium of our Saviour, happiness in that world, where, sooner or later, we are all to appear."

Also the extract of a letter from Edwards & Stewart to the defendant, dated Coquimbo, January 19th, 1821.

"We likewise enclose you herewith account sales of various merchandise brought by Captain Pawson from London. His accounts, bill of lading for two boxes of Chinchilla skins, to your consignment. We also enclose you the bills of the goods for your government. We confess we feel awkwardly situated from our perfect ignorance of Captain Pawson's business, and act only from conversations we have had with Capt. Pawson, and from our judgment. We presume the property belonged to him which came in the ship, for the sale of which he has got credit. His intention was, as well as we can recollect, to invest the proceeds in 250 quintals of copper, provided the ship would load more than the 10,000 quintals, if on the contrary he intended taking only 150 quintals for his account, the Chinchilla skins charged him in his account, and the balance of his funds in silver, if to have been had. This we believe firmly were his views, and on which we should have acted, but fearing compromising ourselves, we have considered it most prudent passing the balance of

22 his account to your credit, and leaving it to * your judgment to settle with his relations in the manner you think most equitable and just, founded on the above facts. We recollect Captain Pawson stating to us, that the cordage sold to the government was shipped on half profits by some manufacturer in England, and in order to throw light upon that part of his business, should you be addressed from England by the same, we have enclosed you separate sales of that article."

Also, the extract of another letter from Edwards & Stewart to the defendant, dated Guasco, January 28th, 1821.

"Enclosed you will receive a bill of lading for 900 pigs of copper, and thirty-six lumps of gold, as likewise another for seventy-four pigs of copper, and one large, and nine small pigs of bar silver, and

sixteen pieces of Pina silver, shipped the former for your sole account, and the latter for account of the late Captain Pawson; by the invoices and account which we likewise enclose you, you will perceive that the whole of your funds we have remitted to the best advantage, and we have only to beg you to call to mind, in case that everything is not exactly correct, the disadvantages we have been under from the sudden death of Captain Pawson."

Also, an extract from another letter from Edwards & Stewart to the defendant, dated Coquimbo, March 9th, 1821.

"As we anticipated, the crew has deserted the ship, and has remaining on board only nine men from the Constellation. We hope to get the residue she may want to carry her home. The carpenter of the ship, from a pique he had against Captain Lane, and to revenge himself, gave information of the spot where your gold and Captain Pawson's silver were stowed on board, to the governor. This was done with so much secrecy by both parties, that we were not aware of the treachery, until the whole was in their possession. It was shipped in Guasco, and stowed by Captain Lane in the bread locker, under all the bread, without the knowledge of any one on board excepting the carpenter, in whom both he and Captain Pawson placed the most implicit confidence. The exportation of virgin silver and gold have been prohibited by the government under confiscation of * the property if taken, and many severe penalties inflicted on the parties concerned. Captain Pawson intended shipping any small balance he might have in those articles, from their paying better than any other remittance to America, from this, hard dollars being at $6\frac{1}{2}$ premium, and ounces at $\$17\frac{1}{4}$, so that in shipping either one or the other, you would have experienced a great loss. We are aware we took upon ourselves some responsibility from not having had written instructions from Capt. Pawson to ship in these articles your balance, but were actuated for your interest, and knowing Captain Pawson would have acted in like manner. We fear the hopes of recovering this property are small, as the law is explicit and severe. We shall make the necessary representations, and send you copies by next opportunity."

23

And another letter from Edwards & Stewart to the defendant, dated at Coquimbo, July 4, 1821.

"We enclose you the proceedings of the confiscation of the silver and gold found on board the ship, which we are sorry to say was eventually lost, notwithstanding the exertions of Capt. Ridgely, Judge Prevost, special agent of the United States of America, and our representations. We are still in hopes that at a future period this property may be recovered, and with this view have thought proper to send you the documents to substantiate any claim you may think proper to institute."

The plaintiffs further offered in evidence, that it was the known custom of trade in Chili and at Coquimbo, to employ agents on shore

in the business intrusted to Pawson, and that it was necessary to do so. And also offered in evidence, that the privilege to the captain of twenty-five tons, mentioned in the contract from Canton to Baltimore, was a valuable privilege, much more so than the like one from Coquimbo, and that it was, and is, the usage of trade for the captain, if he does not use his privilege himself, to let it out to others, and even to be paid for it by the owner, if the owner used it for his benefit. That the freight from Canton to Baltimore, at the time above-mentioned, was from thirty to one hundred dollars per ton. The plaintiffs further offered evidence, that it is the usage of trade, when

24 a captain has such a * privilege as is stated in the defendants' first letter of instructions, to wit, of twenty-five tons from Canton to Baltimore, that this privilege is entitled to a preference even over the owner, in putting the same into the vessel, and that if the captain dies in the course of the voyage, his privilege does not succeed to the next captain, but survives to his representatives.

The plaintiffs further offered in evidence, that on the arrival of the ship here, only 147 quintals of copper were delivered to the plaintiffs, as the share of the said Pawson; and they read in evidence, the following order and account, which were admitted by consent—
“74 pigs copper, weighing 14,779 lbs. of the estate of Captain Pawson, received per the ship Esther, Captain Low, from Coquimbo,”
—signed 29th October, 1821, by the defendant.

The plaintiffs also offered in evidence the following accounts:

JOHN C. PAWSON, (deceased,) in account with JOHN DONNELL.

25

Dr.		Cr.
To balance per settlement in London Sterg.....£3 10 11		By wages from 19th Nov. 1819, till 4th Dec. 1820, his decease, at \$60..... \$750 00
Short credit allowed for passengers from London.....25 00 00	\$ 126 87	Dividends drawn by J. D. on 16 shares Bank Stock, one 1½, one \$2..... 56 00
Premium of Insurance to Maryland Office on \$5,166, at 4 p. ct..... \$207 89		Transfer by Edwards & Stewart, of the balance due by them to Capt. Pawson, after his decease (very improperly to me,) \$7,777 87
Premium of Insurance to Patapco Office on \$6,000 at 2½ p. ct..... 166 25		In which was included the proceeds of cordage taken on board for ac- count some person in London, to be deducted therefrom..... 2,215 18
	\$374 14	5,562 69
Common ½ p. ct. on the sums insured..... 55 83	429 97	
Discounts paid on 16 shares Bank Stock, hypothecat. for \$1,200 in Nov. 1819, re- newed each 60 days, say 14 renewals at \$12.80..... 179 20		Amount sales of said cord- age as above..... 2,215 18
Proportion of landing cop- per from ship Chesapeake and re-shipping on board the Esther, total 550,600 lbs., cost \$2,454.69, which on Capt. Pawson 14,779 will be..... 66 00		After deducting therefrom for freight from London to Coquimbo, being a belligerent port, and an article contraband of war, which subjected my ship and property to confiscation, and an- nulled my insurance, the weight of cordage as per sales at \$6..... \$569 37
Freight paid the ship Esther from Coquimbo to Balti- more on 14,779 lbs., at 2½ cents per lb..... 369 47		Cost of lumps of gold, shipped as a remittance for proceeds of said cordage, being a prohibited ar- ticle, and as seized cost..... 1,452 84
Primage thereon, 5 p. ct..... 18 47		Edwards & Stew- art commission thereon, at 2½ p. ct..... 36 32
Storage, storing, weighing and delivering..... 10 00	397 94	Expenses incurred by claiming its restoration..... 44 16
Amount invoice of copper and bullion shipped by Edwards & Stewart for account..... 4,694 56		2,102 69
Chronometer cost 80l. stg.. 355 55		112 49
Day and night telescope of J. Allen..... 22 00		
Horsburg Directory of Boyd 24 00	401 55	
Balance due by J. D..... 185 00		
	\$6,481 18	\$6,481 18

N. B.—Captain Pawson took from my ship such valuable articles as he fancied for the North Point—He took from the North Point every article, when he left her, for the Chesapeake—It is, therefore, nearly out of my power to trace them—But you can certainly show by his papers, the articles he paid for, and such had, of course, a right to take from the Chesapeake.

J. DONNELL.

2 months interest on \$165.00..... \$1 65	Interest calculated on bonds until due, se- cured by J. D. and for which he has, in settle- ment, retained their amount in his hands—the \$53 to be applied to paying the discount on J. C. Pawson's Stock note at the Office Discount and Deposit, is to be renewed by J. D., and with the \$53, and the \$35 now received, it is expected will pay the above discount, until his, J. C. P's return.
10 " " 165.70..... 8 25	
5 " " 1,721.00..... 43 10	
\$53 00	
Interest on \$1,200 for 18 months.....108 00	
\$55 00	

Received the above \$55, which with the \$53,
interest until his bond fall due, is to be applied
by me to the discount, on renewal of his stock
note for hypothecated Bank Stock, 17th Nov.,
1819.

JOHN DONNELL.

26 * “Sales by Harrison & Sterett, for account of the administrators of the late Captain J. C. Pawson,” in December, 1821, and April and May, 1822, of 14,774 lbs. of copper, amounting, deducting charges, &c. to \$2,843.75.

The plaintiffs further offered in evidence bills of lading, and invoice of the shipments at Coquimbo and Guasco, on the voyage aforesaid. 1. Of 8,000 Spanish doubloons shipped by Horstman from London on the 4th of May, 1820, for the port of Coquimbo, to the order of Captain Pawson, on account of John Donnell. 2. Of 4,219 pigs of copper, weighing 8,076 quintals, &c. and 411 cow hides, by Edwards & Stewart from Coquimbo, on the 19th of January, 1821, for account of John Donnell. 3. Of two boxes and one bundle of Chinchilla skins, containing 456½ dozen, being the property of the late Captain Pawson, and consigned to John Donnell for the benefit of whom it may concern, by Edwards & Stewart, from Coquimbo, on the 19th of January, 1821. 4. Of 74 pigs of copper, weighing 147 quintals, &c. one large and nine small pigs of bar silver, and sixteen pieces of Pina silver, weighing 304 marks, one ounce, shipped by Edwards & Stewart from Guasco, on the 28th of January, 1821, to John Donnell. 5. Of thirty-six lumps of gold, weighing 608 castellanos, five tomines, and 900 pigs copper, weighing 1,795 quintals, ninety-five lbs. shipped by Edwards & Stewart from Guasco, dated the 28th of January, 1821, consigned to defendant.

“Invoice of copper and hides shipped by Edwards & Stewart, on board the American ship Chesapeake, Captain Thos. A. Lane, by order of the late Captain J. C. Pawson, bound for Baltimore, in the United States of America, and consigned to John Donnell, Esq., merchant, of said place.

4,219 pigs of copper, wg. 8,076 qqs. 19 lbs. a 12 ds.....	\$96,914 02½
246 ox, and 411 cow hides,.....	932 01
	<hr/>
	\$97,846 03½
Charges, duties, commission, &c. added,.....	19,259 08½
	<hr/>
	\$117,106 04
	<hr/>

27 * “Invoice of copper and gold shipped in Guasco, by Edwards & Stewart, on board the American ship Chesapeake, Captain Thomas A. Lane, by order of the late Captain J. C. Pawson, bound for Baltimore, in the United States of North America, and consigned to John Donnell, Esq. of said place.

900 Pigs of Copper, wg. 1,795 qqs. 95 lbs. at \$12,	\$21,551 03½	
Storage 1 p. c.	215 04	
	<hr/>	\$21,766 07½
20 round lumps of gold, wg. 172 castellanos		
7½ tomines a 19½ rs.	416 01	
15 do do wg. 403 do 5½ do a 19 rs.	958 05½	
1 do do wg. 32 do a 12½ rs.	78	
	<hr/>	1,452 06½
		<hr/>
		\$23,219 05½
Charges, duties and commission, &c. added.	4,885 03½	
	<hr/>	\$28,105 01½

“Invoice of copper and silver shipped in Guasco, by Edwards & Stewart on board the American Ship Chesapeake, Captain Thomas A. Lane, bound for Baltimore, in the United States of America, by order of the late Captain J. C. Pawson, for acc. and risk of whom it may concern, and consigned to John Donnell, Esq. merchant, of said place.

74 pigs of copper, wg. 147 qqls. 79 lbs. a \$12.	\$1,773 04	
Storage 1 p. c.	17 06	
1 large and 9 small pigs silver, wg. 115 mks.		
1 oz. a \$8 p. mk.	\$921 00	
16 pieces of pina silver wg. 189 mks. 0 oz. ...	1,488 03	
	<hr/>	\$2,409 03”
Charges, duties and commission, &c. added, ..	493 07½	
	<hr/>	\$4,694 04½

“Amount of money paid by Captain Pawson to the crew of the Ship Chesapeake, which returned here from Coquimbo, \$70.59.”

Signed by J. D.

* And also proved that the voyage was in effect protracted by the determination to return immediately to Baltimore, and not go to Canton, as it was much more difficult to obtain a crew for the former voyage than the latter, and the ship was delayed for a long time, for the want of a crew to navigate her to Baltimore.

The defendant then offered and read in evidence the following letters, which were read by consent, and admitted to be in the handwriting of the respective parties thereto.

The only letter which appears to have been offered in evidence by the defendant, is one from one of the plaintiffs to the defendant, dated Baltimore, 15th May, 1822.

“From a minute investigation of the account you furnished, between yourself and the late Captain Pawson, and with a reference to sundry documents in my possession, I have made out the enclosed account. With respect to the \$2,000 for compensation, it appears to have been regularly agreed upon between you and the deceased, as

the privilege he was to have, each voyage, in your ships, consequently it is claimed as a right. The cordage transaction, in your account, is totally inadmissible, the funds which arose from the sale of it, were laid out in bullion, (silver,) which remains in Coquimbo under seizure, as your gold does, and as you are not known in the transaction at all, it of course remains for settlement between the owner in London and the executors of Captain Pawson. As to your charging freight on the cordage from London to Coquimbo, it seems strange indeed. Your ship was going in ballast, and Captain Pawson wrote to you that he would take merchandise, having found great difficulty in procuring the number of doubloons you ordered from Mr. Horstman. I find that in 1816, you permitted Captain Pawson to take goods from other persons to make up his privilege in the ship, and as, by his agreement with the owner of the cordage, he was interested in the sales, it became, of course, a part of his venture from thence. It appears that Captain Pawson allowed you £25 sterling in the account he furnished before he left London. Balance due to you £3 10 11. £50 sterling he laid out for cabin stores. The \$55.83 claimed as commission for effecting insurance, you **29** * never charged in any similar case. I have not ascertained whether the expenses charged on the copper, are customary or not. You'll observe, that Captain Pawson's privilege in the ship was not taken by several thousand pounds weight, of course you will allow for the deficiency, as you have done before.

Mr. JOHN DONNELL, in account with the estate of the late Capt. JOHN C.
Dr. PAWSON. Cr.

1819.			
Nov. 18.—To cash paid interest on 16 shares United States Bank Stock, hypothecated for \$1,200, per your receipt...	\$108 00	By balance due to you as per account furnished by Captain Pawson, in London, including £25 sterling, your proportion of passage money.....	\$15 75
Interest on do. from said date, until 15th October, 1821.	12 36	Cash on 16 shares United States Bank Stock, hypothecated for this amount, 18th Nov., 1819....	1,200 00
Compensation in ship Chesapeake as per agreement, see your letter of instructions, dated 18th Nov., 1819, and as a proof of its being customary, see 21st October, 1817, when Mr. Naucarrow went supercargo \$2,000, and the 25th May, 1816, when Mr. Stith went supercargo \$3,000...	2,000 00	Interest on do. from said period, until 15th Oct., 1821.....	137 44
Wages of Capt. Pawson, as per your account.....	750 00	Insurance in Maryland and Patapsco Offices, per your account	374.14
Dividend received on 16 shares United States Bank Stock, as per your account	56 00	Amount of copper and bullion (silver) shipped by Edwards & Stewart, for account of Capt. Pawson, see their and your account	4,694 56
Amount transferred by Edwards & Stewart, of Coquimbo, a balance due by them to Capt. Pawson, see your and their account...	7,777 87	Balance in your hands on the 15th October, 1821.....	4,352 97
Amount deducted out of seamen's wages, as per your account.....	70 59		
	\$10,774 82		\$10,774 92

To balance from opposite..	\$4,352 97		
To interest on ditto until paid.			
Errors and E. Excepted.			HAMILTON GRAHAM, Act'g Adm'r.
Add the stock on the other side, for which there is no credit.....	\$1,200 00	Claim as set up in Court, viz.....	\$5,552 97
	4,352 97	Drip Stones and duty saved.....	48 06
		Loss of Canton privilege.....	3,050 00
His claim then is.....	\$5,552 97		\$8,651 03
Interest to Jan. 26, 1825.....	1,084 03	Interest from Oct. 15, 1821.....	1,686 94
	\$6,637 00		\$10,337 97
Besides which he claimed loss of privilege.....	255 52		
Drip Stones.....	13 50		
Duty saved at Guasco.....	14 56		
Interest on \$255 52-100.....	49 72		
	\$6,970 30		

* “The defendant then offered in evidence the following in-voice of goods shipped at London, the 27th of April, 1820, and the account of the sales thereof, and the other accounts and papers hereinafter inserted, which were admitted by consent. 30

‘1 bale, 8 cases British piece goods,’ &c. amounting to £1,062 10 8

Commission, brokerage, shipping, &c. 5 p. c..... 53 2 7

£1,115 13 3”

“Account sales of sundries made by Edwards & Stewart to the government of Chili, for account of Captain John C. Pawson, of the Ship Chesapeake. 1820.

Agt. 25. 45 coils cordage, wg. 113 qqs. 87 lbs. a 20 dlls....	\$2,277 03½
1 day and night glass.....	30 00
	\$2,307 03½
Deduct commission 4 p. c. and spy glass.....	122 02
Nett proceeds of cordage.....	\$2,185 01½

Dr. J. C. Pawson’s private acct. with Edwards & Stewart.	Cr.
This account commenced on the 25th of August, 1820, and ended on the 18th of January, 1821.	
The amount of the debits, including charges for 756½ dozen Chinchilla skins, and 10 marks 6½ oz. silver, &c.....	
	\$2,250 07¾
Amount of credits including nett proceeds of sales herewith sent, \$8,070 1¾.....	
	10,028 06¾
Balance due, and this sum credited John Donnell, Esq.	\$7,777 07

“Sales of sundry merchandise received by the Ship Chesapeake, and sold by order and for account of Captain John C. Pawson.”

The whole amount of sales, deducting charges, &c. \$8,070 13¼, dated Coquimbo, and signed by Edwards & Stewart.

31

JOHN DONNELL, Esq. of Baltimore, in account current with EDWARDS & STEWART.

Dr.

Cr.

1821.	
Jan. 19.—To bill of disbursements of the ship Chesapeake at Coquimbo, per account herewith.....	\$2,508 03 ½
Amount of invoice of 8,076 qqs. 19 lbs. of copper, shipped from this port in the ship Chesapeake, Capt. Lane, as per account herewith	117,106 04
Balance.....	32,655 05 ½

1820.	
Aug. 28.—By our draught in favor of Captain Brintnal on Captain Pawson	\$28,309 03
Sep. 16.—Cash received from ditto.	6,192 06
21.—Letter of credit of Messrs. Lynch, Hill & Co. in favor of Capt. Pawson..	3,500 00
Oct. 25.—700 doubloons received at \$17 ½	12,075 00
2,000 " " "	34,500 00
1,300 " " "	22,425 00
Received for 4 bbls. of salt beef, at \$35.....	140 00
Received for 4 water casks at \$15.....	60 00
Month's advance made to a sailor, returned.....	24 03
Cash received of him	60 00
Nov. 27.—2000 doubloons at \$17 ½	34,500 00
Draught of Ed. M'Clure favor J. C. Pawson.....	2,000 00

1821.	
Jan. 18.—Cash received for 2 bbls. tar, at \$10.....	20 00
Do. do. 30 ggs. vinegar, at 50 cts.....	15 00
Discount on \$6,713,1 rrl. paid in the custom house in government paper, being this proportion allowed to be received in paper, the residue paid in cash, at 10 p. c.....	671 02 ½
Balance of Capt. Pawson's account current.....	7,777 07
	\$152,270 05 ½
By balance	\$32,655 05 ½

E. & O. E.—COQUIMBO, Jan. 19, 1821.

EDWARDS & STEWART.

JOHN DONNELL, Esq. of Baltimore, in account with EDWARDS & STEWART.

Dr.

Cr.

To amount of invoice of copper and gold shipped in Guasco.....	\$28,106 01 ½
To amount of invoice of copper and silver shipped on account of the late Captain Pawson.....	4,694 04 ½
To amount of bill for disbursement in Guasco.....	91 03 ½
	\$32,891 03 ½

By balance of account current at Coquimbo.....	\$32,655 05 ½
By 10 per cent. discount, allowed on \$1,777 paid in government paper on the invoice of \$28,106, at 1 ½ rs.....	177 05 ½
By do. do. on that of the late Capt. Pawson.....	14 04 ½
By one month's advance charged twice to Eugenio, merchant.....	30 00
By charge for drip stones not received.....	13 04
	\$32,891 03 ½

E. E.—GUASCO, Jan. 22, 1821.

EDWARDS & STEWART.

32

* “ Disbursements of the American ship Chesapeake, in the port of Coquimbo, by order of Captain Lane, from the 16th February to 30th June, 1821, amounting, including commissions, to

\$1,654.02½. Dated at Coquimbo the 3d of July, 1821, and signed by Edwards & Stewart.

Dr. Capt. LANE, Ship Chesapeake, in account with EDWARDS & STEWART. Cr.

To amount charges on 2,876 bars of copper shipped on board the ship Esther.....	\$2,454 05½	By 124 bars of copper, wg. 304 qqs. 24 lbs, at \$14.4-100, sold to pay the expenses at the price of \$12, and the duties.....	\$4,271 04
Do. do. on 300 bars shipped on board ship Chesapeake.....	315 02½	An error in the calculation of commissions in the invoice of copper shipped at Guasco.....	100 00
Amount of disbursements of ship Chesapeake.....	1,655 02½	Cash recd. for 839 lbs. of bread at \$6	50 02½
		Balance.	3 03½
	<u>\$4,425 02½</u>		<u>\$4,425 02½</u>

"Amount of charges of 2,100 bars of copper, discharged in this port, and 900 bars discharged in Guasco, from on board the American ship Chesapeake, Captain T. A. Lane, in order to ascertain the extent of injury, received on her passage from Guasco to Baltimore, of which bars of the same were reshipped by order of Captain Lane, on board the American ship Esther, Captain F. G. Low, bound for Baltimore, for account and risk of whom it may concern, and consigned to John Donnell, Esq. merchant, of Baltimore," amounting to \$2,454.05½, dated at Coquimbo, and signed by Edwards & Stewart the 3d of July, 1821. This account included a commission on 2,876 bars of copper, amounting to \$1,651.06.

"Account of charges of 300 bars of copper that were discharged from on board the American ship Chesapeake, in order to ascertain the extent of injury received on her passage from Guasco to Baltimore, and reshipped by order of Captain T. A. Lane, of said ship, for account and risk of whom it may concern; and consigned to John Donnell, Esq. merchant, Baltimore," amounting to \$315.02½, including commission on 300 bars of copper, amounting to \$179.04½. Dated and signed as above.

"Disbursements of the American ship Chesapeake, Captain John C. Pawson, at the port of Coquimbo, by Edwards & Stewart, amounting, including commission, to \$2,508.03¾, dated the 19th of January, and signed by Edwards & Stewart. **33**

An invoice of goods, &c. shipped by Edwards & Stewart, by order of Captain Lane, on board the Esther, whereof F. G. Low is master, bound to Baltimore, viz: 2,876 bars of copper, weighing 5,505 quintals 98 pounds Spanish weight, being part of the original cargo of the ship Chesapeake, and shipped for account of whom it may concern, unto John Donnell, he paying freight, &c. Dated Coquimbo, 3d of July, 1821.

Also, the check of the defendant on the Office of Discount and Deposit, in favor of the owners of the ship Esther, for \$14,453.20.

To dispense with a commission to take testimony the plaintiffs admitted: 1st. The transaction of cordage from London to Coquimbo,

according to the account of sales of the cordage. 2. That the cordage was for the joint account of Pawson and Goddard. 3. That gold and silver bullion are prohibited articles of exportation at Chili. 4. The parties agreed that all letters and accounts of sales and accounts current, from Edwards & Stewart, may be read on both sides.

The defendant also offered in evidence, that the usual freight from London to Coquimbo, was fifty dollars per ton. The plaintiffs then offered in evidence, that it was the usage among ship owners and masters, not to charge freight where the ship was in ballast, for any articles shipped by the captain on his own account. The defendant offered in evidence, that there was no usage as above stated, and that the captain was liable for freight to his owner like any other person, if the owner chose to exact it.

1st Exception. The defendant then prayed the opinion of the Court to the jury, that upon the evidence above stated, the defendant is entitled to set off, in this case, the freight on the goods and merchandise, shipped by Captain Pawson, on his own account, from London to Coquimbo; which opinion the Court [ARCHER, C. J. and WARD, A. J.] refused to give, but were of opinion, and so directed the jury, that the defendant is entitled to set-off the said freight,

34 unless the plaintiffs can shew by * testimony, that there was a known and established usage that the captain, under the above circumstances, was not chargeable with freight, and that the said usage was so well known and established, that it must be supposed to have entered into the contemplation of the parties at the time they originally made the contract first hereinbefore stated. The defendant excepted.

2d Exception. The defendant then prayed the Court to instruct the jury, that according to the contract of the parties, as set forth in the correspondence exhibited in the first bill of exceptions, the voyage as originally projected, to wit, from Baltimore to London, thence to Coquimbo, thence to Canton, and thence home to Baltimore, having been altered by the direction of the defendant, and the consent of Captain Pawson, so as to strike out the trip from Coquimbo to Canton, and give the ship a destination direct from Coquimbo home to Baltimore, the privilege originally stipulated for Captain Pawson to bring home twenty-five tons from Canton, clear of freight, was voluntarily relinquished by him, and exchanged for the privilege of bringing home his funds in copper from Coquimbo, and that, consequently, the plaintiffs are not entitled to any compensation for the alleged loss of the privilege of bringing home the twenty-five tons from Canton. Which instruction the Court refused to give, but gave the following opinion and direction to the jury:

The Court are of opinion and so direct the jury, that the plaintiffs are entitled to recover an equivalent for the loss they may prove their intestate to have sustained, by being deprived of his privilege from Canton or Batavia to the United States, in consequence of the

change made by the defendant in the destination of the vessel, unless the jury should be satisfied from the evidence, that the plaintiffs' intestate did, with a knowledge of his legal rights, waive the benefit of the privilege accorded to him at the commencement of the voyage, and did accept in lieu thereof a privilege from Coquimbo to Baltimore. The Court further instruct the jury, that if they believe from the evidence that the plaintiffs' intestate shipped goods from London to Chili, on board the defendant's vessel, that the defendant is entitled to a credit for the freight thereof, unless the jury * shall believe that there existed a definite general and well known **35** usage, at the time of the commencement of the voyage, that freight, under the circumstance of this case, should not be charged by parties standing in the relation of the defendant to the plaintiffs' intestate. And further, unless the jury believe there was such a waiver and acceptance as is stated in the first part of this direction, on the part of the plaintiffs' intestate, that then the defendant is entitled to a reasonable freight for such articles as were shipped on account of, or which belonged to plaintiffs' intestate, from Chili to the United States. The defendant excepted.

3d Exception. The defendant further prayed the Court to instruct the jury, that if they believe that the contract made between the plaintiffs' intestate and defendant, was an entire contract for \$2,000, for the faithful performance of the duties of supercargo by Pawson, and a strict conformity to the instructions he should receive, that then the violation of his duty as supercargo by a departure from his instructions in taking on freight, prohibited articles, thereby putting the ship and the owner's interest therein, in jeopardy, was such an infringement of the entire contract, as took away from the plaintiff any right to demand the fulfilment of the same on the part of the defendant. Which opinion and direction the Court refused to give. The defendant excepted.

4th Exception. The defendant then prayed the Court further to instruct the jury, that according to the contract of the parties as set forth in the correspondence exhibited in the first bill of exceptions, the compensation of \$2,000 stipulated to be paid to Captain Pawson, as supercargo, had relation to the original voyage from Baltimore to London, thence to Coquimbo, thence to Canton, and thence home to Baltimore; and that the voyage having been shortened by striking out the trip to Canton, and making the destination of the vessel direct from Coquimbo to Baltimore, and Captain Pawson having moreover, died at Coquimbo, in the course of the voyage, before he had completed the investment of the defendant's funds, that compensation is subject to abatement in the discretion of the jury on two * grounds—first, for the alteration of the voyage, if the jury shall be of opinion that the labor and responsibility of **36** Captain Pawson were thereby lightened—Second, for that portion of the contemplated services of Captain Pawson, which were lost

to the defendant by his death at Coquimbo. Which instruction the Court refused to give, but were of opinion, and so directed the jury, that if they believed the evidence in the cause, the plaintiffs were entitle to recover of defendant a rateable proportion of the sum of \$2,060, which proportion the jury should ascertain by computing the time from the commencement of the voyage to Captain Pawson's death, and from his death until the duties of supercargo were completed by the signature of the bill of lading, for the homeward voyage, and that the jury may allow him as supercargo such portion of the said sum as they may deem him entitled to, for acting in said capacity, up to the time of his death, at Coquimbo, according to the rule above stated. The defendant excepted.

5th Exception. The defendant then prayed the Court to instruct the jury, that, according to the contract of the parties as set forth in the correspondence exhibited in the first bill of exceptions, the compensation of \$2,000, stipulated to be paid to Captain Pawson, as supercargo, on the voyage originally projected, to wit, from Baltimore to London, thence to Coquimbo, thence to Canton, thence home to Baltimore, was one entire compensation to be paid for one entire service, on the return of Captain Pawson to Baltimore, and not subject to be apportioned by a part performance of the service, unless Captain Pawson had been prevented by the defendant from performing the residue thereof—that the voyage having been altered by the consent of the parties (as appears by said correspondence) by striking out that part of it which related to the trip to Canton, and directing the destination of the ship from Coquimbo to Baltimore, without saying any thing of the aforesaid compensation to Captain Pawson, as supercargo, that stipulation attached upon the new voyage, precisely in the same manner in which it had been attached to the original voyage, that is to say, that it was one entire compensation for one entire service, not subject * to be apportioned

37 by a part performance of the service, and that consequently, the death of Captain Pawson at Coquimbo, in the progress of the voyage, and before the complete performance of the service, put an end to all claim on the part of the plaintiffs, to any part of the \$2,000. Which opinion and direction the Court refused to give. The defendant excepted.

6th Exception. The defendant then prayed the Court to instruct the jury, that in estimating the value of the privilege of twenty-five tons from Canton to Baltimore, which, according to the opinion expressed in the first bill of exceptions, the plaintiffs are entitled to claim in this action; if it was not relinquished and exchanged by Captain Pawson by the privilege from Coquimbo, the jury should consider that privilege as having been subject to the contingency of the safe arrival of the ship at Canton, and the continuance of Captain Pawson's life, and that either the destruction of the ship or the death of Captain Pawson at Coquimbo, in the course of that voyage, would

have put an end to all claim by his representatives on account of this privilege. Which instruction the Court refused to give, and instructed the jury that these contingencies ought not to enter into their calculation. The defendant excepted.

7th Exception. And the defendant further prayed the Court to direct the jury, that the plaintiffs are not entitled to recover the said sum of \$2,000, nor any part thereof, under the evidence given in this cause. Which opinion and direction the Court refused to give. The defendant excepted.

8th Exception. The defendant also prayed the Court to direct the jury, that if the jury believe that Captain Pawson had actually purchased before his death, a sufficient quantity of copper, which, with the other property, purchased by Captain Pawson for account of the defendant, and afterwards put on board, was sufficient to exhaust the funds of the defendant confided by him to Pawson, that then the plaintiffs are not entitled to recover the compensation of \$2,000, mentioned in the letters of instruction of the defendant, unless the defendant received on board of his ship a sufficient quantity of copper to exhaust his * said funds. Which opinion and instruction the Court refused to give. The defendant excepted. **38**

9th Exception. The defendant further prayed the Court to instruct the jury, that there is no evidence in the cause from which they can infer that Captain Pawson consented to the change of the original voyage from Coquimbo to Canton, and from Canton to the United States, and waived his privilege from Canton to the United States, through ignorance of his legal rights, the presumption of law being that, if he had full knowledge of the facts, he had full knowledge of his legal rights growing out of those facts. Which opinion and instruction the Court refused to give. The defendant excepted.

10th Exception. In addition to the evidence stated in the preceding bills of exceptions, the plaintiffs offered in evidence, that the gold which was seized at Guasco, was purchased after the death of Pawson, and after all the copper which the said ship would bear, was actually purchased and loaded on board the said ship, and that the same was purchased with the very doubloons brought by Pawson for, and on account of Donnell, from England, and which remained in possession of Edwards and Stewart, at the time of Pawson's death; and that the said gold was actually purchased by, and under the advice of Thomas A. Lane, acting as the captain—which said Lane was the mate of the ship, and succeeded to the command on the death of Pawson—that in the said proceeding Lane had no other authority from Donnell to act as his agent than what was derived from his succeeding Pawson as captain of the ship, and was acting under the instructions of Donnell to Pawson before mentioned. The plaintiffs then prayed the opinion of the Court to the jury, that if the jury find from the evidence, that the gold which was seized and lost at Guasco, after the death of Paw-

son, was purchased by Edwards and Stewart after Pawson's death, with the separate funds of Donnell, and on his account, and shipped accordingly, without any power or authority from Pawson to do so, that then the defendant is not entitled to set off the value or cost

of the gold against the claim of the plaintiffs in this suit.

39 * Which opinion the Court refused to give. The plaintiffs excepted.

11th Exception. The defendant further prayed the Court to instruct the jury, that, according to the orders of the defendant, assented to by Captain Pawson, as set forth in the correspondence exhibited in the first bill of exceptions, it was the duty of the said Pawson, as the supercargo and agent of the defendant, to invest all of the defendant's funds in copper at Chili, if copper could be had, and to bring the same home, and deliver it to the defendant in Baltimore; and if, in these circumstances, Pawson holding both the defendant's funds, and his own, after having purchased and put on board the ship *Chesapeake*, copper equal to the amount of the defendant's funds, thought proper, for any reason, to make an investment in gold or silver, and did, during his life, make much investment; or if his agents, Edwards & Stewart, succeeding to the possession of those joint funds, did, after copper had been purchased and put on board equal to the amount of defendant's funds, make any such investment in gold or silver, and if such gold and silver was afterwards seized by the government of Chili, and confiscated, as having been attempted to be exported, contrary to the laws of the country, that the loss must be borne by Pawson and his representatives, and cannot be thrown on the defendant. Which opinion and instruction the Court gave. The plaintiffs excepted.

12th Exception. The defendant further prayed the Court to instruct the jury, that if, upon the whole evidence in the case, they shall be of opinion, that copper was brought home, equal to the whole amount of the funds of the defendant, and equal to Pawson's privilege in copper, (as he was willing to accept it) that the plaintiffs are not entitled to recover of the defendant, the amount of any gold or silver which Pawson or his agents, Edwards & Stewart, may have put on board the *Chesapeake*, of their own accord, and without the knowledge, consent, or orders of the defendant, and which may have been afterwards seized by the government of Chili, and confiscated, as having been attempted to be exported, contrary to the laws of the land—and that the defendant's having received from Captain Lane,

the * successor of Captain Pawson, in the command of the **40** *Chesapeake*, the letters and invoices sent to him by Edwards & Stewart, is not, under the circumstances of the case, such a ratification of the act of purchasing and putting on board such gold and silver, as to throw the loss of it upon the defendant, and to authorize the plaintiffs to recover it from him in this action. Which opinion and instruction the Court gave. The plaintiffs excepted.

Verdict and judgment for the plaintiffs for the sum of \$5,510.43. From which judgment both parties, the plaintiffs and defendant, appealed to this Court.

The cause on both appeals was argued before BUCHANAN, C. J., STEPHEN and DORSEY, JJ.

Williams, (District-Attorney of U. S.) for Pawson's administrators, the appellants in the first appeal, contended in argument on the three bills of exceptions taken on the part of the plaintiffs below, viz: the 10th, 11th, and 12th bills of exceptions.

1. That the gold, which was seized at Guasco, and there condemned, having been purchased by Edwards & Stewart, after the death of Pawson, without his authority, but with the advice of his successor, Captain Lane, and with the money of the defendant, ought not to be charged to Pawson, nor the cost thereof deducted out of his funds.

2. That Pawson ought not to bear the loss of the gold, purchased, seized and condemned as aforesaid. 1st. Because he was not bound to invest all the defendant's money in copper, to the exclusion of his own funds. 2d. Because he did not purchase any gold in his lifetime;—and, 3d. Because Edwards & Stewart were not his agents, after his death, so far as regarded the defendant's funds, but were in that respect, the defendant's agents.

3. That Edwards & Stewart, being, after Pawson's death, only his agents, or the agents of his representatives, for the funds of Pawson in their hands, and being the agents of the defendant, for the funds of his in their hands, and Pawson having a co-equal right with the defendant to have his funds invested in copper; and the said agents having actually invested a part of the defendant's funds in gold, and none of Pawson's in that * article, the loss of the gold is the defendant's, and not Pawson's representatives. **41**

On the second point he referred to 2 *Liv. on Agency*, 298; 1 *Liv. on Agency*, 261 to 278; *Taylor vs. Plummer*, 3 *Maule and Selw.* 562; 2 *Liv. on Agency*, 281.

C. C. Harper, for Donnell, the appellee in the first, and the appellant in the second appeal, stated that for the appellant in the second appeal, it would be contended,

1. That no usage can, in such a case, be permitted to be engrafted upon, or to control a written and express contract so plainly and unambiguously set out. This point arises under the first, and a part of the second bills of exceptions.

2. That the privilege from Canton depended entirely upon the voyage to Canton, which was within the control of the defendant below, as owner of the ship; that this privilege was expressly waived by Pawson for an equivalent, with knowledge of his legal rights; and that, with knowledge of the facts, ignorance of his legal rights was no excuse. This point embraces a part of the second bill of exceptions.

3. That Pawson's acceptance or non-acceptance of the new voyage, and substituted privilege, was a question of law, and that the Court ought to have construed the writings under which the question of acceptance arose, and not have left it to the jury. This point embraces also a part of the second bill of exceptions.

4. That the record affords no evidence of any ignorance of his legal rights, and that the Court ought so to have directed the jury, as prayed in the ninth bill of exceptions, and erred in refusing such direction. This point embraces the ninth bill of exceptions.

5. That the \$2,000 agreed to be paid as compensation to Pawson, depended on the performance of the entire voyage, and on his return to Baltimore, which were conditions precedent. This point embraces the third, fifth, and seventh bills of exceptions.

42 * 6. That if the whole \$2,000 cannot be recovered, there cannot be an apportionment, and no part of it can be recovered. This point embraces the same bills of exceptions in part.

7. That Pawson, by departing from the instructions of the defendant, (the owner of the ship he commanded, and in whose employ he was) and by his other misconduct, as detailed in the record, lost his right to demand the compensation of \$2,000, or any part thereof. This point embraces the same bills of exceptions in part.

8. That the Court below having pronounced an opinion that there could be an apportionment of the compensation of \$2,000, they erred in directing the jury not to allow any abatement by reason of the shortening of the voyage, or the death of Pawson, and they also erred in fixing the "date of the signature of the bill of lading for the homeward voyage," as the period at which his duties as supercargo, were completed. This point embraces the fourth bill of exceptions.

9. That if the privilege from Canton did not depend entirely on the voyage to Canton taking place, and the defendant was liable to Pawson for the loss of the original voyage and privilege surrendered by him "under a mistake of his legal rights," then the jury, in estimating the value of the privilege so surrendered, ought to have taken into their calculation the possible death of Pawson, or the probable loss of the ship before she reached Canton, and the Court below erred in refusing such direction to the jury as prayed by the defendant in the sixth bill of exceptions.

10. That if Pawson had actually purchased, before his death, an amount of copper, which, with the other property purchased for the defendant, and put on board, was sufficient to exhaust the funds of the defendant, confided to Pawson by him, that then the plaintiffs below were not entitled to recover the \$2,000, unless the defendant received on board his ship, a sufficient quantity of copper to exhaust his funds, and the Court below erred in not so directing the jury, as prayed for by the defendant below, as stated in the eighth bill of exceptions. Under this point, the defendant (now appellant) con-

tends, that Pawson * was special agent for the purchase of copper; that if he was general agent, he violated his duty by not using a sound discretion; that Edwards & Stewart were his agents; and that the gold and silver belonged to him. **43**

11. The appellant will also contend, under the eighth bill of exceptions. 1st. That independent of the hypothetical assumption in the prayer upon which this exception is founded, the fact that a surplus of copper (over and above all the defendant's funds, and over and above the 147 quintals delivered to Pawson) remained in the ship, is proved by the evidence in the record. 2d. That the ship was sent, and Pawson employed for a special purpose; that she was not a general ship, and therefore Pawson could not take in goods for other persons, or interfere with the owner's arrangements, and thereby throw a loss upon the owner. 3d. That if he could so use the ship as to bind his owner to third persons, the owner might set-off the compensation of \$2,000 against such loss.

On the second point he cited 1 *Liv. on Agency*, 150, 151; *Doct. and Stud. ch. 26*, page 79; *ch. 46*, page 253; *Lowry vs. Bordieu*, *Dougl.* 471, (455;); *Lammott vs. Bowly*, 6 *H. & J.* 520. On the fifth point, *Portage vs. Cole*, 1 *Saund.* 320, (note 4;); *Furnival vs. Crew*, 9 *Mod.* 455, 459. On the sixth point, *Cutter vs. Powell*, 6 *T. R.* 320; *Cook vs. Jennings*, 7 *T. R.* 381. On the tenth point, *East India Company vs. Hensley*, 1 *Esp. Rep.* 111; *Fenn vs. Harrison*, 3 *T. R.* 757; *Gibson vs. Colt*, 7 *Johns.* 393; *Prince vs. Clark*, 8 *Serg. & Low.* 54; *Esp. Evid.* 64; 1 *Com. on Cont.* 237; 2 *Liv. on Agency*, 298.

R. B. Magruder, on the same side. On the first point he cited *Poth. on Mar. Cont.* 13, 14, 32, 135; *Abbott on Shipping*, 137, (119,) 557; 3 *Stark. Evid.* 998, 1036. On the third point, *Macbeath vs. Haldimand*, 1 *T. R.* 180, 182; *Ferris vs. Walsh*, 5 *H. & J.* 308. On the fourth point, *Key vs. Parnham*, 6 *H. & J.* 418; *Davis vs. Davis*, 7 *H. & J.* 36. * On the seventh point, *Abbott*, 183; *Montgomery vs. Wharton*, 2 *Peters' Adm. Rep.* 401; 1 *Com. on Cont.* 221, 222, 225, 230, 235; *Robinson vs. Hindman*, 3 *Esp.* 235. On the eighth point, *Abbott*, 482. On the ninth point, *Pothier*, 135. On the eleventh point, *Abbott*, 119; 1 *Com. on Cont.* 221, 222; *Campbell vs. Thompson*, 2 *Serg. & Low.* 481, (1 *Stark.* 490;); *Locke vs. Smith*, 10 *Johns.* 250; the Act of 1785, *ch. 46* and *47*; *Clarke vs. Magruder*, 2 *H. & J.* 77; *McFadon vs. Baltimore Insurance Company*, 4 *H. & J.* 45. **44**

Williams, (District Attorney of the U. S.) in reply to the argument of counsel for Donnell, on the bills of exceptions taken by him, and which constitute the subject of the second appeal, on the first bill of exceptions, he cited 3 *Stark. Evid.* 1038; 2 *Stark. Evid.* 453, 454, 447, 452; *Birch vs. Depeyster*, 2 *Serg. & Low.* 359, (1 *Stark.* 210;); *Senior vs. Armitage*, 3 *Serg. & Low.* 71; *Cutter vs. Powell*, 6 *T. R.* 320; *Zagary vs. Furnell*, 2 *Campb.* 240; *Renner vs. Bank of Columbia*, 9 *Wheat.* 582; *Jackson vs. The Union Bank of Maryland*, 6 *H. & J.* 146; *Bank of Columbia vs. Magruder*, *Ibid.* 172, 180; *Phill. on Ins.*

18; *Park*. 589, 630; *Marsh*, 226, 259, 270, 365, 375, 707; *Trott vs. Wood*, 1 *Gall. Rep.* 444; *Winter vs. Brockwell*, 8 *East*, 308. On the eighth bill of exceptions, *Peake's Evid.* (Norris' Ed.) 416; *Winchester vs. Hackley*, 2 *Cranch*, 342; 2 *Stark. Evid.* 642, 643; *Farnsworth vs. Garrard*, 1 *Campb.* 38. On the third bill of exceptions, 1 *vol. Laws of U. S.* 272. On the fourth bill of exceptions, *Etting vs. Bank of United States*, 11 *Wheat.* 75; 1 *Liv. on Agency*, 69 to 180; 2 *Liv. on Agency*, 214, 215; *Kendrick vs. Delafield*, 2 *Cain*, 67, 72; *The United Insurance Company vs. Scott and Seaman*, 1 *Johns.* 111, 115; *Abbott*, 270; *Thorne vs. White*, 1 *Peters' Adm. Rep.* 176, (note;) *Rice vs. The Polly and Kitty*, 2 *Peters' Adm. Rep.* 420.

45 * On the fifth bill of exceptions, *Cutter vs. Powell*, 6 *T. R.* 320; *Abbott*, 427; *Hart vs. The Ship Littlejohn*, 1 *Peters' Adm. Rep.* 115, 118, 119, 121; *Pothier*, 116, 117, 118; *Pordage vs. Cole*, 1 *Saund.* 320 (note 4;) *Campbell vs. Jones*, 6 *T. R.* 570; 2 *Stark. Evid.* 642; 1 *Pow. on Cont.* 267.

On the second bill of exceptions, *Laidlaw vs. Organ*, 2 *Wheat.* 178, 183, 195; *Etting vs. Bank of United States*, 11 *Wheat.* 75; 1 *Liv. on Ag.* 71; *M'Intire vs. Bowne*, 1 *Johns.* 238, 259; *Lammott vs. Bowly*, 6 *H. & J.* 522, 524.

On the ninth bill of exceptions, *Lammot vs. Bowly*, 6 *H. & J.* 522, 524; 1 *Stark. Evid.* 399; *Etting vs. Bank of United States*, 11 *Wheat.* 76.

On the sixth bill of exceptions, *Etting vs. Bank of United States*, 11 *Wheat.* 75; *Abbott*, 489, 434; *Val. Com. tit. 4, Art. 3*; 2 *Bro. C. & A. L.* 533; *Pothier*, 120, 126; *Nap. Code, Art. 250*; *Morrison vs. Galloway*, 2 *H. & J.* 461 to 468; *Sigard vs. Roberts*, 3 *Esp. Rep.* 71; *Knight vs. Crockford*, 1 *Esp. Rep.* 192, 193; *Campbell vs. Jones*, 6 *T. R.* 570; *Hoyt vs. Wildfire*, 3 *Johns.* 518; *Sullivan vs. Morgan*, 11 *Johns.* 66.

The causes were then postponed, and by agreement, written arguments of the counsel were to be submitted to the Court; and the following were accordingly submitted.

Taney, (Attorney-General) for Pawson's administrators. In the case now under discussion, (the one in which Donnell is appellant,) it will be found that there are three subjects in controversy between the parties.

1. Is Donnell entitled to charge freight on the goods of Pawson, shipped "on his own account" from London to Coquimbo?

2. Are Pawson's administrators entitled to recover any part of the \$2,000, mentioned in Donnell's letter of November 18, 1819? And if they are entitled to recover a part, what proportion are they entitled to recover, and by what rule is that proportion to be ascertained?

46 * 3. Are the administrators of Pawson entitled to recover compensation for the privilege of twenty-five tons, from Canton to Baltimore, stipulated in Donnell's letter of November 18, 1819,

and of which Pawson was deprived by the act of Donnell, in changing the voyage originally contemplated?

The defendant below has brought up nine exceptions, and each of them will be found to relate to one of the items above mentioned, and to involve some of the questions there stated. Instead, therefore, of taking up the exceptions, in the order in which they are set forth in the record, they will be classed and considered in this discussion, according to the above arrangement.

First point.—Is Donnell entitled to charge freight on the goods and merchandise shipped by Pawson, on his own account, from London to Coquimbo. This question is presented by the prayer of the defendant, and the opinion of the Court in the 1st exception. The same principle is again decided in the second exception.

The whole course and objects of the voyage contemplated, when the vessel sailed from Baltimore, are detailed in the letter of Donnell of November 18, 1819, and the alterations afterwards made, will be found in his letter of December 26, 1819.

According to both letters, the ship was to proceed in ballast from London to Chili. The amount of goods shipped by Pawson, and his motives for this shipment, will be found in his letter. "In consequence," says Pawson, "of the scarcity of doubloons, I have thought it advisable to invest my own funds in merchandise, in hope that it may do as well, and because I would not interfere in any manner with your business." See also his letter of April 27, 1826.

It is admitted, that the contract between Donnell and Pawson was in writing, but the whole of the written contract is not before the Court. It was contained in part in the shipping articles, and in part in the letters of Donnell before referred to. In the admissions, the monthly pay of Pawson as stipulated in the shipping articles, is stated:—but what else is contained in that paper does not appear. It belonged to the ship, and on her return * to Baltimore, must, with the other papers of the vessel, have fallen into the hands of Donnell. It is not suggested in the record, that this document has been lost or mislaid. Why it was kept back, is not explained, nor is it necessary now to inquire. But while Donnell withholds the paper, and gives no proof of its contents, he cannot be allowed to say that the usage relied on by the plaintiffs, is contrary to, or inconsistent with other provisions contained in the agreement. So far as the contents of the writings are before the Court, they are silent as to the privilege claimed under the usage, and certainly contain no stipulation in opposition to it, or inconsistent with it. They do not say that Captain Pawson may, or that he may not ship goods on his own account from London to Coquimbo. And if goods should be shipped by him, they do not say whether he shall, or shall not pay freight. The contract, as we are allowed to see it, is silent on this subject. 47

The writing being silent in relation to the right in question, the first enquiry is, can the known and established usage of trade, annex to this contract as incident to it, a right in the captain to ship the goods herein before mentioned, free from freight? This inquiry involves two questions. First, can the known and established usage of trade give to either of these parties a right, not stipulated in the writing? Secondly, if usage may give such a right, is the usage in question a reasonable usage, or is it unreasonable, and therefore illegal and void?

Upon the first of these questions the appellees insist, that in a commercial contract, custom and usage may superadd a right to either of the parties, concerning which the written contract between them is silent. 3 *Stark. Ev.* 1038; *Bank vs. Magruder*, 6 *H. & J.* 180; *Renner vs. Bank*, 9 *Wheat.* 581; *Wigglesworth vs. Dallison*, *Doug.* 196; *Senior vs. Armitage*, 3 *Serg. & Low.* 71; 2 *Stark. Ev.* 452; *Cutter vs. Powell*, 6 *T. R.* 320; *Abb. on Shipping*, 213, note. Secondly, the usage alleged by the appellees is a reasonable one. 2 *Stark. Ev.* 447; *Winter vs. Brockwell*, 8 *East*, 308.

On the second point as to whether Pawson's administrators are entitled to recover any part of the \$2,000 mentioned in Donnell's letter of Nov. 18, 1819, and if so what proportion and by what rule that proportion is to be ascertained, he cited 1 *Peak. Ev.* (*Ed. Norris*,) 416; *Winchester vs. Hackley*, 2 *Cranch*, 342; 1 *Com. on Con.* 226, 227; 2 *Stark. Ev.* 642, 644; *Farnsworth vs. Garrard*, 1 *Camp.* 38; *Etting vs. Bank*, 11 *Wheat.* 75; *Portage vs. Cole*, 1 *Saund.* 320, note 4; *Abb. on Shipping*, 426, 427, 433; *Hart vs. Ship*, 1 *Peters' Adm.* 115; *Johnson vs. Sims*, *Ib.* 215; *Poth. Mar. Con. Pl.* 179-193; *Rex vs. Whittlebury*, 6 *T. R.* 467; 3 *Stark. Ev.* 1766; 3 *Salk.* 784; 1 *Pow. on Con.* 267, 268; 2 *Liv. on Agency*, 215; *Kendrick vs. Delafield*, 2 *Caine*, 67, 72; *Ins. Co. vs. Scott*, 1 *Johns.* 111, 115; 1 *Liv. on Agency*, 69, 72; 2 *Ib.* 215; *Abb. on Shipping*, 217, 218.

On the third point he contended that the administrators of Pawson are entitled to recover compensation for the privilege of twenty-five tons from Canton to Baltimore, stipulated in Donnell's letter of Nov. 18, 1819, and of which Pawson was deprived by the act of Donnell in changing the voyage originally contemplated. *Laidlaw vs. Organ*, 2 *Wheat.* 183; *Etting vs. Bank*, 11 *Wheat.* 75; 1 *Stark. Ev.* 399, 400; *Poth. Mar. Con.* 203; *Hoyt vs. Wildfire*, 3 *Johns.* 518; *Sigard vs. Roberts*, 3 *Esp. N. P. C.* 71; *Gondell vs. Pontegny*, 4 *Camp.* 375; *Cook vs. Jennings*, 7 *T. R.* 381; *Abb. on Shipping*, 424, 425; *Mahoon vs. The Gloucester*, 2 *Peters' Adm. Dec.* 403; *Rice vs. The Polly*, *Ib.* 423; *Limeland vs. Stephens*, 3 *Esp.* 269; *Valin Con. B.* 3, tit. 4, Art. 3; 2 *Br. Adm.* 533; *Jacobson's Sea Laws*, 148; *Com. Code Napoleon*, Art. 250; *Sullivan vs. Morgan*, 11 *Johns.* 66.

Wirt, for Donnell, contended that the matter of the Canton privilege, arising upon the letters alone, was a question solely for the

Court. *Macheath vs. Haldiman*, 1 T. R. 172, 180; *Ferris vs. Walsh*, 5 H. & J. 308; *Davis vs. Davis*, 7 H. & J. 36.

That the contract was an entire one, and the whole compensation therefore lost by the death of Pawson at Coquimbo before he had completed the contract. 3 *Starkie Ev.* 1765; *Ellis vs. Hamlin*, 3 Taunt. 52; *Countess of Plymouth vs. Throgmorton*, 1 Salk. 65; *Cutter vs. Powell*, 6 T. R. 326; *Rex vs. Whittlebury*, 6 T. R. 467; *Spain vs. Arnott*, 2 Stark. Cas. 265; *Com. Dig. tit. Justices of Peace*, B. 63.

That admitting, *argumenti gratia*, that this contract is divisible, and the compensation to be apportioned, the Court below did not assume the proper *termini* of the service to make the apportionment. 2 *Livermore*, 214, 216.

Taney, (Attorney-General,) in reply, referred to *Taylor vs. Plumer*, 3 Maul. & Sel. 574; *Prince vs. Clark*, 8 Serg. & Low. 54.

DORSEY, J. at this term delivered the opinion of the Court. Of the refusal of the Court to grant the instruction prayed for, which forms the ground of appeal on the appellant's first bill of exceptions, we entirely approve. Had the instruction been given, it would have been a palpable invasion of the unquestionable and exclusive right of the jury: that of deciding on facts, of which contradictory testimony is adduced. The appellees "had offered in evidence, that it was the usage among ship owners and masters, not to charge freight where the ship was in ballast, for any articles shipped by the captain on his own account." The appellant then "offered in evidence that
* there was no usage as above stated, and that the captain **144**
was liable to freight to the owner, like any other person, if he chose to exact it." In such a state of the proof, the Court could not do otherwise than reject the prayer, calling on them to decide a fact thus controverted.

In the appellant's second bill of exceptions are involved questions of great magnitude to the commercial world and of much intrinsic difficulty; and we regret that we are called to the decision of these questions, without proof of commercial usages upon the subject. In the argument it is conceded by both parties, that the owner of the ship and cargo has the uncontrolled power of breaking up or changing the voyage, but they differ most widely as to the consequences which would ensue, and the nature of the responsibilities, to which the owner would thereby be subjected. For the appellant it was contended that this well established prerogative of the ship owner, entered into the contemplation of Donnell and Pawson, who contracted in reference to it. That upon its exercise no new liabilities were created; the Canton privilege no longer formed any part of the contract; nor had Pawson any claim to indemnity for its loss. This is assuming much broader ground than was occupied by the prayer to the Court below: which appears predicated on the admission of Pawson's title to recover, but for his alleged voluntary relinquish-

ment of his right. The appellees, on the other hand, insist, that upon the change of the voyage, Pawson was not only entitled to claim an indemnification for the injuries thereby sustained: but the full value of the Canton privilege, exempt from all the casualties to which it was naturally liable; and also the whole compensation, stipulated as an allowance to the supercargo, whether the services for which it was equivalent were ever rendered or not; all which on the part of the appellants, is strongly controverted. The principles, contended for by each party, are perhaps stretched further than reason or justice would sanction or public policy requires. And it may readily be imagined, how the counsel on both sides, if yielding to the impulse of their clients' interest, would have changed hands in the argument, had a new modification been given to the facts, in

145 the case, * which whilst it varied its aspects, would not in the slightest degree have removed it from the operation of the principles now attempted to be applied to it. Suppose, for example, the voyage contracted for had been from Baltimore to London, and thence home with a cargo of dry goods, the stipulated compensation of Captain Pawson, in addition to his monthly wages, being three hundred dollars; but no privilege. After the sailing of the vessel, owing to a sudden depression in the price of dry goods, Donnell changes the voyage: directs that eight thousand doubloons be taken on board at London: be transported to Coquimbo: there converted into a full cargo of copper: which was to be sold at Canton, and the proceeds of sale there invested by Pawson in a suitable invoice were to be brought home by him, in the Chesapeake to Baltimore: under such circumstances would Pawson's counsel, as they now do insist on the compensation fixed in the original contract, when the emolument incident to the substituted voyage, by universal usage of trade, were twenty times as great as those which belonged to the original? Impelled by the interests of their client, they surely would require, the accustomed reward for the services rendered. Whilst the counsel for the appellant, if influenced exclusively by his interests, would insist on his discharge, upon payment of the sum specified in the agreement.—But suppose another case slightly variant in circumstances, but the same in principle—A ship owner in Baltimore, for a fixed compensation (say \$300) employs a captain to navigate his vessel to the Havana: there to sell his outward and purchase a return cargo. Before she reaches the mouth of the Chesapeake, her destination is changed; she is ordered on a trading voyage that may last for years; she is to double Cape Horn and return by the Cape of Good Hope; would it be attempted to limit the reward for the captain's services to the sum mentioned in the original agreement? But to present the question on facts more immediately before us, suppose the Chesapeake on her originally destined voyage, before she had passed the waters of Maryland, had been ordered to Norfolk, there to sell her cargo and return to Baltimore; could it be pretended that Pawson

would in such circumstances have been * entitled to the two thousand dollars, and the undiminished value of the Canton privilege ? **146**

If the rule contended for either by the appellants or the appellees be a good one, it must work both ways, as well to cases where the length of the voyage is increased, as where it is diminished. In its operation it would always work injustice to one party or the other; and in the latter case, it would, in effect, annihilate that acknowledged and invaluable right in ship owners, of controlling the destination of their property; as its enjoyment would be visited by penalties more than equivalent to the losses apprehended from the original, or benefits anticipated from the substituted voyage. Reason, justice and public policy, are never to be lost sight of in the construction of commercial contracts; in unison with which, it would be difficult to reduce the rules insisted on by the parties to this controversy. The principles which should govern cases like the present, according to our views, (in the absence of all commercial usage on the subject,) are these. If by the exercise of this important privilege, a special injury is done to the captain or supercargo, the ship owner must bear the loss; he must make a reasonable indemnity. If on the contrary, by the change of voyage the captain or supercargo be necessarily discharged from the performance of all the duties, for which a remuneration has been stipulated, his claim to such remuneration is thereby extinguished. If a part of the duties have been executed, then such a proportion of the stipulated compensation should be allowed, as appears just, on comparing the services rendered, under the voyage originally contemplated, with those which remain unperformed. For the interpolated part of the voyage the usual compensation must be paid. The parties should be placed, as nearly as may be, in the same condition in which they would have stood, had a previous contract, for the voyage as changed, been entered into between them. To all the customary emoluments of a captain or supercargo, on such a voyage, are those officers respectively entitled.

The County Court, we therefore think erred, in the appellant's second bill of exceptions, in refusing to instruct the jury as * prayed, that "the plaintiff (below) is not entitled to any compensation, for the alleged loss of the privilege of bringing home the twenty-five tons from Canton;" that being a privilege, so inseparably connected with the vessel's destination to Canton; that upon its ceasing, as it did, to be one of the *termini* of the voyage, the privilege of necessity expired with it. **147**

With the opinion of the Court below in the third bill of exceptions we concur. The alleged misconduct of the captain, having produced neither injury nor inconvenience to the appellant, forms no defence to the present action.

According to the views before expressed by us, the County Court were in error in their refusal to grant the prayer in the appellant's fourth bill of exceptions; and also in the opinion and direction they thereon gave to the jury, and in conformity with the same views, we approve of their refusal of the opinion and direction prayed for in the appellant's fifth bill of exceptions.

The decision made by this Court on the second bill of exceptions, renders it unnecessary for them to examine the opinion of the County Court in the appellant's sixth bill of exceptions; as by that decision the appellant's prayer becomes wholly immaterial and irrelevant to the issues in the cause; and let the determination of the County Court be what it might, it would furnish no ground for reversing their judgment. The same may be said in relation to the appellant's ninth bill of exceptions.

Of the refusal of the Court below to grant the prayer in the appellant's seventh bill of exceptions we in part approve and in part disapprove. They were wrong in refusing to instruct the jury that the plaintiffs below were not entitled to recover the said sum of two thousand dollars; but were right in refusing to instruct the jury that they were not entitled to recover "any part thereof."

We concur with the County Court in their refusal to grant the appellant's prayer contained in his eighth bill of exceptions.

There being cross-appeals in this case, it now becomes necessary to consider the exceptions on the part of the appellees. It has been attempted to sustain the opinion of the County Court in the appellees' first bill of exceptions, on the ground that * Edwards
148 & Stewart were the agents not of Donnell, but of Pawson, and, that he only must be answerable for their acts. With this doctrine to the extent to which it is urged we cannot concur. It is in proof, that it was the known and necessary custom of trade at Chili and at Coquimbo in the business in which Pawson was engaged, to employ agents on shore, such as Edwards & Stewart. That the selection of such agents in this case, was not made *bona fide*, and with discretion, there is no insinuation. The consequences of the neglect, omissions, or misconduct of Edwards & Stewart, in their agency, not imputable to Pawson, must be borne by Donnell; in fact they are his agents, though appointed by, and under the immediate control of Pawson. For their acts therefore, after Pawson's death, not flowing from any instructions previously given by him, in relation to Donnell's funds, they only, and to him alone, are answerable. This doctrine is fully sustained by the opinion of this Court in the case of *Jackson vs. The Union Bank of Maryland*, 6 H. & J. 150, and by the late decision of Judge Hallowell before a special jury in the District Court of the City and County of Philadelphia. In refusing, therefore, to give the instruction prayed for, we think the County Court erred.

The prayer in the appellee's second bill of exceptions being in the alternative, the Court below were right in instructing the jury, that

if Pawson in his life-time made the investment in gold, that he must bear the loss; but in the instruction given on the latter branch of the alternative, we conceive the Court were wrong, upon the grounds assumed by us in the consideration of the appellee's first bill of exceptions. It being a question, under all the proofs and circumstances of the case, fairly open for discussion before the jury; whether the purchase of the gold was made under any instruction or authority from Captain Pawson. By their decision, they have determined that matter of fact in the affirmative, and consequently overleaped one of the barriers interposed between the Court and the jury.

The first branch of the third exception of the appellee's, is inaccurately drawn; and if construed according to its obvious import, might have been rejected by the Court for irrelevancy * to the matters in issue before them. It prays an instruction to the jury "that the plaintiff (below) is not entitled to recover of the defendant, the amount of any gold or silver, which the said Pawson, or his agents, the said Edwards & Stewart, may have put on board the Chesapeake, of their own accord, and without the knowledge, consent or orders of the defendant (below) and which may have been afterwards seized by the government of Chili, and confiscated as having been attempted to be exported contrary to the laws of the land." The plaintiff did not claim to recover the amount of any gold or silver; on the contrary, the gist of the controversy was his disclaimer of all interest in the gold or the funds with which it was purchased. The prayer was therefore inapplicable to the issue. But give to the exception that construction which has been ascribed to it in the argument; that it presents the question whether the amount of this gold, could by the jury be discounted from any claim which Pawson might have upon Donnell, and the prayer is too wide to be gratified *in extenso*. If the investment in gold was made by Pawson in his life-time, or in obedience to his directions, then the discount contended for should have been sanctioned by the Court; but if the investment were the act of Edwards & Stewart without orders from Pawson, then the loss of the gold shipped must fall upon Donnell. The instruction of the County Court embraces both alternatives, and is therefore erroneous. In their opinion, on the latter part of this exception, regarding the ratification by Donnell, of the purchase and shipment of the gold, we concur with the County Court.

Having assented to the decisions of the Court below, contained in the appellant's first, third, fifth and eighth bills of exceptions; but dissented from those in the appellant's second, fourth and seventh bills of exceptions; and having dissented from their opinions in the appellee's three bills of exceptions: their

Judgment is reversed, and a procedendo awarded.

150 * WIRGMAN'S Adm'rs *vs.* MACTIER.—December, 1829.

The owner of a ship after she was laden at Baltimore, on the 14th May, 1810, agreed with the shippers of the cargo, in writing, that their goods were "to be landed in a permitted port on the continent of Europe, (meaning that they were not to be landed at the Island of Sylt,) before the freight should be earned, but should the whole of the continent be shut, the freight, with an addition as arbitrators might determine, would be earned, should the property be landed in England, agreeably to the custom of the country." On the 25th April, 1810, a charter party had been entered into for the same ship, by which the owner covenanted to proceed with his ship from Baltimore, north about, for the Island of Sylt, thence to Hamburg or Bremen, if open to American ships, if not, the cargo to be landed at Sylt if permitted, and in case of refusal there, thence to such permitted port in the North Sea or Baltic, as the master and supercargo might direct; and should the Baltic be closed against the admission of American vessels, then to such other port as the master and supercargo might again direct. The freight was to be paid agreeably to the bills of lading, provided the cargo was discharged at a port in the North Sea; but if delivered at any port in the Baltic, an advance in the freight was covenanted for; and should the Baltic be shut, a further advance in the freight to be settled by arbitration. On the 8th May, 1810, a bill of lading was also signed for the plaintiff's goods, which stated the ship to be bound from Baltimore to Sylt, and a permitted port in the North Sea or Baltic, the goods to be delivered at the aforesaid permitted port, unto P. of Hamburg, who was not the supercargo of the ship. In an action where the plaintiff claimed under these contracts, he offered testimony to establish that certain ports in Europe, not on the North Sea or Baltic, were open to American vessels, but the Court held that looking to the historical facts and occurrences of the time, it was manifest that the voyage was undertaken, and the charter party, bill of lading, and agreement entered into, with a view to the then political state of affairs in Europe, and should be construed with a view thereto—that the permitted port on the continent of Europe, in which, the goods, were by the agreement to be landed, before freight could be earned, was intended to be a permitted port in the North Sea or the Baltic; and also that all the said instruments must be construed in connection with each other, and the general terms in the agreement of the 14th May, restricted to the North Sea and Baltic; and therefore rejected the testimony offered, as inadmissible and irrelevant.

Whether ship owners are entitled in equity and good conscience, to retain money received on account of freight, is clearly a question not to be left to the jury; but proper only to be decided by the Court, under the circumstances of each case.

151 * So where in an action of assumpsit brought by the owner of merchandise shipped in the defendant's vessel, to recover a sum which the defendant had received and retained for freight, it appeared that the shipment was made under the charter party, bill of lading, and agreement above referred to, and that the master was furnished with instructions from the plaintiff, as follows, "on account of the unsettled state of affairs on the continent of Europe, I have thought proper to request my friends Messrs. P. & Co. of Hamburg, in the event of the cargo of

the ship being denied entry at their port, to consult with you on the further destination of the ship, and the disposal of my interest on board. In case they have no friend at the port she may proceed for, you will please take charge of it, and advise with them what is best to be done for my interest. On your arrival off Sylt, should the situation of affairs be such as to prevent you from communicating with Messrs. P. & Co. in that case you will have to proceed with the cargo where you judge it will be most advantageous for all concerned, when I shall consider my part as entirely under your charge, &c." The ship sailed on her voyage, was captured before her arrival off Sylt, taken into a port in Norway, but ultimately released. The master, after the restoration of his ship and cargo, without consulting with the consignees about the further destination of the ship, or disposition of the plaintiff's property, although he had the means of communicating with them, proceeded with his ship to England, there delivered his cargo, and received (from the agents who sold the cargo,) as freight, the sum claimed in this action. HELD, he was not entitled to retain it.

Where by the municipal regulations of certain ports, a certificate of origin was necessary to the admission of certain merchandise there, a ship-master having received such goods on board his ship, and signed a bill of lading for their delivery at one of such ports, cannot in the absence of evidence to shew it was the duty of the shipper to furnish such a certificate, set up the fact of that document not being on board his ship, as an excuse for not entering the port at which he had agreed to land the property entrusted to him; nor as a justification for his delivering it at another port, and thereby earn freight.

APPEAL from Baltimore County Court. This is the same case which was before this Court at December Term, 1819, (4 H. & J. 558,) on appeal from Baltimore County, wherein the judgment was reversed, and the record remitted under a *procedendo*.

1. At the second trial, the same evidence was offered as on the first trial, and which is set out in the bill of exceptions then taken, see 4 H. & J. 568] except that stated in page 574, lines 5, 6, 7, 8 and 9, from the bottom, as to the * understanding of the merchants of Baltimore, &c. Also that of H. Campbell, in page 152 75, lines 5, &c. and substituting that of James Dooley as hereafter mentioned. Also omitting in page 575, lines 3, 4, 5, 6 and 7 from the bottom. The defendants in order to prove that Peter Wirgman was ordered to leave Denmark by the Collector of the Customs at Flekkefiord without delay, read in evidence the deposition of James Dooley, taken by consent. He deposed "that he was the second officer on board the ship William Wilson, Peter Wirgman, commander, on a voyage to Europe, in the year 1810. In the month of October or November of the same year, while the said ship was lying at Flekkefiord, in Norway, and before the Admiralty proceedings against said ship were terminated, the deponent was present at conversations between E. Thomman, supercargo of said ship, and said Peter Wirgman, in which the said Thomman united with the said Wirgman in determining that in the event of the liberation of said

ship and cargo, they would proceed with the same to the port of Hull, in England. That subsequent to the above conversation, and while the said ship lay at Flekkefiord, as aforesaid, the said Thomman, in the absence of Captain Wirgman, asked this deponent, and Walter Pratt, first officer of said ship, what time it would require to get said ship in readiness for sea; and then declared his determination to proceed with said ship and cargo, in the event of their liberation, to Hull, as aforesaid. That a day or two afterwards the said Thomman left Flekkefiord and proceeded, as this deponent understood, to Christiansand, and this deponent did not see him afterwards. This deponent further saith, that some time in the latter end of November, the said ship left Flekkefiord, and dropped down to the Albernes, and remained there until about the 10th day of December, when Captain Wirgman came on board from Flekkefiord, accompanied by a pilot, who ordered the ship to be got underweigh; and declared, in answer to a question put to him by this deponent, why he meant to proceed with the ship to sea that night, that he had received an order to that effect from inspector Lassen, who was the Collector or Custom House Officer at Flekkefiord. This deponent further saith, that two or three * days before the said ship proceeded to sea, the said **153** Wirgman sent an express to Fahareund, to hurry the said Thomman on to Albernes, to join the said ship. That the said Peter Wirgman expressed an anxiety that the said Thomman should arrive at Albernes before the said ship proceeded to sea. That after the said ship had got down to the harbor's mouth, the night being very tempestous and stormy, Captain Wirgman prevailed upon the pilot to return with said ship to her former anchorage, alleging the weather as an excuse, but in reality, as this deponent understood, to afford further time for the said Thomman to join the ship; but that the said ship, after getting within a quarter of a mile of her former anchorage, was struck aback and compelled to proceed to sea; that the said ship proceeded to Hull, and that on her passage, this deponent heard Captain Wirgman frequently express a wish that said Thomman had joined the said ship at Albernes, as the said Thomman had promised."

The defendants further offered evidence that the cargo of the plaintiff was colonial produce; and to prove that no American vessel, laden with colonial produce, would have been permitted at the time the said ship William Wilson left Norway, as aforesaid, to land the said produce in any port in the Baltic or North Sea, unless the cargo of such vessel was accompanied by proper certificates, showing the origin thereof, and that the same was not the produce of Great Britain, or any of her colonies, read in evidence, by consent of the plaintiff, from the British Register, the American Register the American state papers, and the Federal Gazette newspaper, published in Baltimore, in the year 1810, certain orders, decrees and municipal regulations of France, Denmark, Prussia, Russia, Austria and Sweden,

which it was agreed should be read in the argument of this cause before the Court of Appeals. The defendants also offered in evidence, that Wirgman, after he left Flekkefiord, as aforesaid, was without further means, or opportunity of communicating with the said Parish & Co. until his arrival at Hull, as aforesaid.

The plaintiff then offered to prove by John Donnell, a witness, sworn at the bar, that a certain ship or vessel, called the **154** * Eleanor, belonging to the said Donnell, with a cargo consisting of colonial produce, had sailed from Baltimore, in the year 1810, and proceeded to Constantinople, a port on the continent of Europe, situated on the Dardanelles, where she had landed and delivered her cargo in safety, without any molestation by the government of that country; and also offered in evidence by the same witness, that in the year 1810, a vessel belonging to him proceeded to the port of Salonica, on the continent of Europe, on the Morea, loaded with colonial produce; and also offered evidence that the port of Gibraltar, on the continent of Europe, was, in the year 1810, open to American ships, loaded with colonial produce. To the admissibility of which evidence the defendants objected, because the said evidence had no relation to the matter in controversy in this suit, between the plaintiff and defendants; but the Court [ARCHER, C. J., HANSON and WARD, A. J.] overruled the said objection, and admitted the said evidence; being of opinion and so directed the jury, that the contract of the said Charles & Peter Wirgman with the plaintiff, was not limited to the ports of the continent in the North Sea or Baltic, but extended to every port of the continent of Europe whatsoever. To which opinion and direction and the admission of said evidence, the defendants excepted.

2. The defendants then moved the Court to direct the jury, that if they shall believe that agreeably to the orders and decrees of France, Prussia, Russia, Sweden, and Denmark, as produced in evidence in this cause, all uncertificated colonial produce was prohibited from entry into the ports of those respective countries, and that the captain of the ship William Wilson was unprovided with a certificate of origin for that part of the cargo which belonged to the plaintiff, and which consisted of colonial produce; that then the captain was justified in not attempting to enter any of the ports of the countries before mentioned, to land the said cargo, and that in proceeding to Hull for that purpose he fulfilled the contract between the plaintiff and the ship owners, and entitled them to freight according to said contract, and consequently that the plaintiff cannot recover in this action. Which direction the Court refused to give. The defendants excepted.

* 3. The defendants also moved the Court to direct the jury, that if from a consideration of all the circumstances as given **155** in evidence in this cause, they shall be of opinion, that the defendants are entitled in equity and good conscience, to retain the money

by them received, that then the plaintiff is not entitled to recover on the first count of his declaration. Which direction the Court refused to give. The defendants excepted.

4. The defendants further moved the Court to direct the jury, that if they shall be of opinion that all the ports of the continent of Europe, on the North Sea and in the Baltic, were closed by municipal regulations against the admission of a vessel and cargo in the predicament of the William Wilson at the time of her liberation by the Court of Admiralty at Christiansand, and that in these circumstances, the William Wilson was expelled from the ports of Norway by the orders of the Danish government so suddenly as not to allow time for a further correspondence between Peter Wirgman and David Parish & Co. of Hamburg, that by these events, and by force of the letter of instructions from the plaintiff to Peter Wirgman, of the 8th day of May, 1810, the said Wirgman became the special agent of the plaintiff, and that being such special agent if he proceeded to Hull and then accepted that part of the cargo which belonged to the plaintiff in satisfaction of the contract, he the plaintiff is not entitled to recover in this action. Which direction the Court refused to give. The defendants excepted; and the verdict and judgment being against them, they appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN and DORSEY, JJ.

157 *Meredith*, for the appellants. * 1. On the first bill of exceptions. The question is, whether the charter party or the letter or agreement of the 14th of May, was the contract between the parties to this suit. A parol agreement inconsistent with one under seal, cannot be set up against the agreement under seal. 3 *Stark. Evid.* 1002; *White vs. Parkin*, 12 *East*, 578, 583; *Wood vs. Day*, 7 *Taunt.* 646, (2 *Serg. & Lowb.* 247; *Abbott on Shipping*, 454. The agreement of the 14th of May, is repugnant to the charter party. The charter party stipulates, that the cargo might be landed at Sylt; and the agreement of the 14th of May, is, that the cargo should not be landed at Sylt. If the agreement of the 14th of May, did not control the charter party, was the construction given to that agreement, consistent with the charter party. *Com. on Cont.* 23, 24, 25, (*Ed.* 1824.) The contract originally stood alone on the bill of lading. The charter party, in fact, was not executed till the 14th of May. The ports in the Baltic and North Seas only were in the contemplation of the parties; no other construction can be given to their agreements. The construction of general expressions in agreement is to be restrained. 6 *Bac. Ab. tit. Statute*, 381; *Adams vs. Woods*, 2 *Cranch*, 341.

2. On the second bill of exceptions. It was the duty of the plaintiff below, to provide certificates of origin of his part of the cargo, required by the municipal regulations of the countries mentioned in this exception. He had covenanted by the charter party to do so.

3. On the third bill of exceptions. The first count in the declaration is for money had and received. It is an equitable count; and the defendants are entitled in equity and good conscience, to retain the money received by P. Wirgman. The plaintiff cannot go into the original liability of the party.

Scott, for the appellee, referred to the decision of this Court on the former trial in this case, as reported in 4 *H. & J.* 568, and to the argument of the counsel as taken in manuscript, but not reported, to show that what has been relied on by the counsel for the appellants now, was not then insisted on. 1. On * the first bill of exceptions, he cited *Pow. on Cont.* 370, 371. 2. On the second bill of exceptions, he stated that more than fourteen years had elapsed between the transaction and the last trial, so that it could not be proved whether or not the captain was furnished with the necessary certificates. The objection raised at the last trial, had not been urged at the former one, or the necessary proof might have been then procured. There was no evidence adduced that the vessel was prevented from entry into any of the ports, because of the want of the certificate. She had been captured, but was acquitted at one of the ports. 3. On the third bill of exceptions, he cited 2 *Com. on Cont. part 3, Ch. 6, Am. Reg.* 21. **158**

Taney, (Attorney-General of Maryland) on the same side. 1. On the first bill of exceptions. This Court in the former case, decided that the parties could make a contract different from the charter party, as to the separate property of any of the shippers. The charter party was a mere formal paper. It was not delivered, and no action could be supported on it. It was executed for no other purpose, but as necessary to make the ship's papers regular. It cannot be the deed of the parties, unless it was intended as such. *Com. on Cont.* 25, 27, 28; *Moorson vs. Page*, 4 *Campb.* 103; 5 *Petersdorf*, 363, 367, 310, 372, 350, 351, 371; *Barker vs. Hodgson*, 3 *Maule & Selw.* 267; 2 *Barnic. & Ald.* 17; *Hadley vs. Clarke*, 8 *T. R.* 259; *Smith vs. Wilson*, 8 *East*, 437; *Touteng vs. Hubbard*, 3 *Bos. & Pull.* 295, (*note.*)

2. On the second bill of exceptions. The jury were not the judges of the written decrees of foreign countries. The construction of those decrees was for the Court, and not for the jury. *Etting vs. Bank of United States*, 10 *Wheat.* 50. Did any of the decrees prevent the entry of the vessel, unless she had a certificate of the origin of the cargo? The captain was not bound to sail without the certificate, if it was necessary. Is it a paper of the cargo or of the vessel? *Abbott on Shipping*, 260, 261. Who was to prove that the certificate was on board of the vessel? If the captain was to prove that it was not on * board, then he did not prove that fact. It is to be presumed to have been on board of the vessel. It was not in the power of the plaintiff to prove that it was on board, as it was in the possession of the captain. The captain did not attempt to enter the port, but sets up an excuse for not attempting it. **159**

He was then bound to prove why he did not. *Van Omeron vs. Dowrick*, 2 Campb. 42; *Tarleton vs. M'Gauley*, Peake's N. P. Cas. 205.

3. On the third bill of exceptions. The jury are not to decide what is equity and good conscience. *Hunter vs. Princep*, 10 East, 378.

4. On the fourth bill of exceptions. There is no legal evidence of the fact that the vessel was ordered away from Flekkefjord. It was only the declarations of the pilot, which are not evidence.

Wirt, in reply. 1. The construction attempted and insisted on by the counsel of the appellee, is, that there were two agreements—one between the ship owners and the appellee, and the other between them and the other shippers. There is a sealed instrument and an unsealed instrument, inconsistent with each other. Which is to give the law of the contract? Can an agreement under seal be revoked by an agreement not under seal? The authorities already cited on the part of the appellants are admitted; but it is said that this Court decided the question on the former trial. That question was not before this Court on the former appeal, as to the comparative dignity of the two instruments. General expressions found in a statute are to give way to the intention of the Legislature. 1 *Blk. Com.* 87; *Com. on Cont.* 533; *Woods vs. Fulton*, 2 H. & G. 71. 2. If the Court were not called on to expound the decrees of the foreign countries offered in evidence, then the jury were the judges of both the law and the fact. But the jury were not required to expound the decrees at all. The question put to the jury was, if they believed that agreeably to the decrees, the ports of the countries were closed as to uncertified colonial produce, and there was no certificate, &c. then

160 Wirgman was *justified in going to England. The certificate was necessary for the safety of the cargo, but not for the vessel. The owner of the vessel could not know whence the cargo came; that was in the knowledge of the freighters. *Holt on Shipping*, 81; *Levy vs. Costerton*, *Holt's Rep.* 170. The plaintiff was bound to prove that the certificate was on board of the vessel. He might have proved by the consul at Baltimore, that he had obtained the certificate required. How could Wirgman prove that it was not on board? He could not prove a negative. But it has been insisted, that it is be presumed that all necessary papers were on board, and *Van Omeron vs. Dowrick*, 2 Campb. 42, was relied on for that purpose. In that case it was the officer of the same country, and it was presumed he did his duty. It has nothing to do with the case now before this Court. The case of *Tarleton vs. M'Gauley*, Peake's N. P. Cas. 205, is not applicable to the present question. 4. On the fourth bill of exceptions, he referred to *Drake vs. Hudson*, 7 H. & J. 399.

BUCHANAN, C. J. delivered the opinion of the Court. This is an action of assumpsit brought to recover a sum of money retained by Charles & Peter Wirgman, who were the owners of the ship William

Wilson, on account of freight, out of the proceeds of that part of the cargo, shipped on board that ship, which belonged to the appellee; and the question is, whether freight was earned or not.

Four bills of exceptions were taken at the trial. The appellee who was the plaintiff below, offered to prove, that the ports of Constantinople on the Dardanelles, of Salonica on the Morea, and of Gibraltar, all on the continent of Europe, were in the year 1810, open to American vessels loaded with colonial produce, an objection to the admissibility of which testimony, made on the part of the appellants, was overruled by the Court. This forms the subject of the first bill of exception, and involves the construction of the contract between the appellee and Charles & Peter Wirgman.

* It is stipulated in the charter party, that the master shall proceed with the ship from Baltimore for the Island of Sylt; **161**
 “and if, on arrival there, it can be ascertained that the ports of Hamburg and Bremen are open to the admission of American vessels, that the said master shall forthwith proceed to whichever of the said ports, the supercargo and himself shall think most for the interest of the freighters. But should the said ports of Hamburg and Bremen continue closed, then the said cargo shall be landed at Sylt if permitted; and in case of refusal to permit the same to be landed at Sylt, that then the said master shall proceed therewith to such permitted port on the North Sea or the Baltic, as he and the supercargo shall order and direct. And should the Baltic be also closed against the admission of American vessels, in such case the said master shall proceed with the said cargo to such other port, as he and the said supercargo may in their discretion think most proper. And that on the arrival of the said ship at the port of delivery, the said master shall and will make a right and true discharge of the said cargo, to the supercargo, or to such other agent, factor or consignee of the freighters, as they may direct, agreeably to the bills of lading to be signed for the same, and so end and finish the said intended voyage, &c.” and the freighters covenant to “pay freight for said cargo agreeably to bills of lading to be signed for the same, provided the said cargo be discharged at a port in the North Sea; but if delivered at any port in the Baltic, not higher than Kiel or Colberg, then, &c. to pay unto the owners an advance of, &c. on the amount of freight money stipulated in the said bills of lading. If higher than Kiel or Colberg, and not higher than Koningsburg a like advance of, &c. and if higher than Koningsburg a like advance of, &c. and should the the Baltic be shut, a further advance to be settled by arbitration, &c.”

This is not an action upon the charter party, and it is not perhaps necessary to inquire what would be the proper construction of that instrument if it stood alone. But taken together with the bill of lading, to which it refers, it seems very clear * that the permitted port contemplated, was a port in the North Sea or the **162**
 Baltic.

One of the stipulations in the charter party is, that in case of a refusal to permit the cargo to be landed at Sylt, the master shall proceed therewith to such permitted port in the North Sea or the Baltic, as he and the supercargo shall order and direct. And another is, that on the arrival of the ship at the port of delivery, the master shall discharge the cargo, to the supercargo, or to such other agent, &c. of the freighters, as they may direct, agreeably to the bills of lading to be signed for the same, and so end and finish the said intended voyage, with a covenant by the freighters to pay freight agreeably to the bills of lading to be signed. And the bill of lading for the goods of the appellee, states the ship to be bound from Baltimore for Sylt and a permitted port in the North Sea or Baltic, and that the goods are to be delivered at such permitted port, unto Messrs. David Parish & Co. Hamburg, or their assigns, he or they paying freight, &c. at certain stipulated rates.

Here then is a charter party, in which the owners engage to deliver the cargo at a permitted port in the North Sea, or the Baltic, to the agent of the freighters, agreeably to the bills of lading to be signed, and so to end the intended voyage; and the freighters to pay freight agreeably to the bills of lading, with certain stipulated advances.

And a bill of lading of the goods of the appellee, in which, they are contracted to be delivered at a permitted port in the North Sea, or the Baltic, to Messrs. Parish & Co. Hamburg, or their assigns, at certain rates of freight therein mentioned.

So far then as concerns the goods of the appellee, it is a contract for the delivery of them at a permitted port in the North Sea, or the Baltic, to the Messrs. Parish & Co. Hamburg, or their assigns, at the rate of freight mentioned in the bill of lading, and the advances stipulated in the charter party, and the ending of the voyage by such delivery of the goods at such permitted port. The charter party by the references to the bills of lading, in the provisions for the delivery of the cargo to the agent of the freighters, "agreeably to the bills of lading to be signed," * and the payment of freight "agreeably
163 to the bills of lading to be signed," adopted, and made a part of it, the stipulation in the bill of lading of the appellee's goods, for the delivery of them at a permitted port in the North Sea, or the Baltic, to the Messrs. Parish & Co. Hamburg, or to their assigns, and for the payment of freight; and is the same, as if instead of referring to the bills of lading, it had expressly stipulated, that the master should deliver the goods of the appellee, at a permitted port in the North Sea, or Baltic, unto Messrs. David Parish & Co. Hamburg, or to their assigns, for the freight mentioned, and so end and finish the said intended voyage; that is, to end and finish the voyage, as respected the interest of the appellee, by a delivery of his goods to the Messrs. Parish & Co. or their assigns, at a permitted port in the North Sea or Baltic.

There were a number of persons interested in the cargo besides the appellee; and the different provisions in the charter party, with the engagement to deliver the cargo agreeably to the bills of lading, (in the plural,) were probably introduced to meet the views and interests of the several shippers, according to the stipulations of their respective bills of lading, and whatever latitude may have been given in any of the other bills of lading, that for the goods of the appellee, limited the contract in relation to them to a port in the North Sea, or Baltic, and surely the parties were competent so to contract.

Then comes the memorandum or agreement of the 14th of May, 1810, entered into by the owners, which is in these words: "We hereby agree and acknowledge, that the sundry goods shipped by you on board the ship William Wilson, Peter Wirgman, master, are to be landed in a permitted port on the continent of Europe, (meaning that they are not to be landed on the Island of Sylt,) before the freight is earned. But should the whole of the continent be shut, the freight with an addition, (as arbitrators may determine,) will be earned, should the property be landed in England, agreeable to the custom of the country." And this agreement is supposed so to alter and control the voyage, as to extend the contract between the Wirgmans and the appellee to any port on the continent of Europe.

* This cause was once before in this Court, on an appeal from the judgment of the Baltimore County Court, and on a reversal of that judgment, was sent back under a *procedendo*—and it is probable that that Court has been misled by the loose language of the opinion delivered on that appeal, and has supposed, that the contract of the parties was held by this Court, to relate not merely to ports in the North Sea or the Baltic, but to any port on the continent of Europe, no matter where, or in what sea, as is now insisted upon here. And perhaps, looking to the opinion alone, that would be its construction; but it was certainly not so intended. Having delivered the opinion myself, I can speak confidently on the subject, and regret that it was not delivered in more guarded and restricted terms. 164

But the idea, that the contract looked for the destination of that part of the cargo at least, which belonged to the appellee, to any permitted port on the continent of Europe, other than a port on the North Sea or Baltic, was not suggested in the argument, which was particularly, and with great force, directed to the political state of affairs in Europe, in reference to what was commonly called the continental system, and the advanced and inclement season of the year, which it was contended forbid an attempt by the master to navigate the Baltic; and with the danger of capture and detention by privateers, justified his proceeding to Hull, and there delivering the cargo. The whole course of the argument which was a very elaborate one, pointed to a state of things having no connexion with, or relation to, other ports on the continent of Europe, not in the North Sea or

Baltic. The question whether the contract contemplated any other permitted port on the continent of Europe, than one in the North Sea or the Baltic, was not raised, nor thought of by the Court, at least by myself; but looking only to those seas, and construing the engagements between the parties, with reference to the known state of affairs in Europe, as likely to operate upon the governments on the continent, having ports in those seas, and not the governments without the influence of that state of things, and having ports in other seas, the broad terms, the whole of the ports on the continent of

165 Europe, to be found in the opinion * delivered, were too carelessly perhaps taken from the agreement, and were not meant to be used with reference to all the ports of the continent, no matter where or in what seas, as the ports intended by the contract, at some one of which the goods were to be delivered, before freight could be earned; but to the ports only on the continent of Europe, in the North Sea or the Baltic, according to the subject-matter then in the view of the Court. And that we think, is the only legitimate construction that can be given to the papers at that time, as now before us.

Looking to the historical facts and occurrences of the time, to which we may judicially look, and cannot well shut our eyes against them, it is manifest that the voyage was undertaken, and the charter party, the bill of lading, and the agreement entered into, with a view to the political state of affairs in Europe, and should be construed with a view to that state of affairs; and so interpreted, it is not difficult to perceive, that the permitted port on the continent of Europe, in which the goods were, by the agreement to be landed before freight could be earned, was intended to be a permitted port in the North Sea or the Baltic; other ports on the continent of Europe, such as Constantinople, the ports in the Morea and Gibraltar not being affected by the system, the state of things, in the view of the parties, and the ports of the continent in the North Sea and the Baltic being alone within their influence.

The question is not what would be the correct construction of the agreement of the 14th of May, 1810, if it stood alone, without any index pointing to the intention of the parties, that could be properly looked to; or anything in the context, to restrict the understanding of the general terms used, according to their plain and popular meaning, to a mere special and peculiar sense; but it is apparent that that agreement relates to the voyage, contemplated by the charter party and bill of lading of the appellee's goods, and the acknowledgment that they are to be landed in a permitted port on the continent of Europe, before freight is earned, has reference to, and so far recognizes the contract arising from those instruments, and should

166 therefore be * construed in connection with them, and that contract, looking for the destination of the appellee's goods, to a permitted port in the North Sea or Baltic, the agreement speaking

in relation to that contract, must be understood, by the terms "on the continent of Europe," to mean on the continent of Europe, in the North Sea or Baltic, and to have used those terms only for the purpose of showing, that the goods were to be landed on the continent, as distinguished from the Island of Sylt, and that interpretation is given to it, by the clause immediately following in the agreement itself, "meaning that they are not to be landed on the Island of Sylt," that is, that the terms "on the continent of Europe" mean not on the Island of Sylt, or denote, that they were not to be landed on the Island of Sylt, but on the continent only, before freight could be earned, and were used for that, and no other purpose. And the words in the last clause, but should the whole of the continent be shut," have reference to what goes before, and must be construed to mean the continent, in the same restricted sense, in which it is before spoken of, that is, the whole of the continent of Europe on the North Sea and Baltic—and cannot mean any part of the continent, not contemplated in the preceding part of the agreement. Under this construction of the agreement, taken in connection with the charter party and bill of lading to which it relates, the contract between the parties is, that the goods shipped by the appellee shall not be landed on the Island of Sylt, but at some permitted port on the continent of Europe in the North Sea or Baltic, before any freight shall be earned; but in the event of the whole of the ports on the continent of Europe in the North Sea and Baltic being shut, then, and not otherwise, the owners shall be entitled to freight on the goods being landed in England, with a stipulated addition.

The ports of Constantinople, on the Dardanelles, of Salonica, in the Morea, and of Gibraltar, were not the permitted ports contemplated by the contract; proof therefore of their being open in the year 1810, to American vessels loaded with colonial produce, was irrelevant and inadmissible, and the testimony of John Donnell ought to have been rejected.

* By the term shut, as used in the contract, is meant an occlusion by the municipal regulations of the country, and **167** unless in that sense of the term, all the ports on the continent of Europe in the North Sea and Baltic were closed against the admission of the goods of the appellee, on board the ship William Wilson, the vessel could not earn freight by going to England, nor then, unless the instructions given by the appellee in his letter of the 8th of May, 1810, to Peter Wirgman, the master, were complied with.

It has been contended, that if agreeably to the orders and decrees of France, Prussia, Russia, Sweden and Denmark, all uncertificated colonial produce was prohibited from entry into any of the ports on the continent, in the North Sea or Baltic. It was incumbent on the appellee to have furnished the captain of the ship with a certificate of origin of that part of the cargo which belonged to him; and that if he neglected to do so, the captain fulfilled the contract of affreight-

ment by proceeding to Hull, and there delivering the cargo. But we think otherwise, and that the want of such a document alone, was not sufficient to justify the captain in proceeding to Hull, and there delivering the appellee's goods. All parties were aware of the unsettled state of affairs in Europe, and the difficulties that would probably attend the landing of the cargo at any of the contemplated ports in the North Sea and Baltic. The charter party and bill of lading show it; the agreement and letters of instruction prove it. The goods were shipped, and the voyage undertaken, with the expectation of having risks and difficulties to encounter, and the contract and instructions were framed accordingly. The ship owners knew when they signed the agreement, which was subsequent to the bill of lading, that no certificate of origin was on board, and with that knowledge, and a knowledge of the character of the cargo, made their engagement with a view to the difficulties that might attend the landing of such a cargo, under such circumstances; and can no more avail themselves of the want of that document, because of the prohibition merely of uncertificated colonial produce, than they could

168 have done of the fact, that the cargo consisted of *colonial produce, if the prohibition had been of all such produce, uncertificated or otherwise. If in the latter case, they could not have sheltered themselves under the pretext alone, that the cargo consisted of colonial produce, and was therefore prohibited from entering any of the contemplated ports, having made their contract in relation to such a cargo; neither can they in this case, avail themselves of the circumstance alone, that the appellee's part of the cargo consisted of uncertificated colonial produce, and was therefore prohibited, having made their contract in relation to goods in that known predicament. The same reason would seem to apply in one case, as in the other; the prohibition in both being of the goods on board. In one, of goods without a certificate of origin; in the other, either with or without such a certificate, and there is no evidence in the cause to show that it was incumbent on the appellee to have provided such a paper, to enable him to resist the claim of the ship owners to freight, or that he was required to do so. The shipment was made on a calculation of chances, and the knowledge, advice and assistance of the Messrs. Parish & Co. Hamburg, were evidently much relied upon for the success of the enterprise. And to obtain the benefit of their counsel and assistance, the appellee, in his letter of instructions to Peter Wirgman, the master, informs him, that he had requested them to consult with him on the further destination of the ship, and the disposal of his interest on board, in the event of an entry being denied at Hamburg; directing him to advise with them, as to what was best to be done for his interest; and constituting him his agent, if the state of affairs should be such as to prevent his communicating with them; in which case, he tells him to open his letters of instructions to them, to which he refers him for his

government. These instructions the master was bound to obey; it was his duty diligently to seek and to pursue the advice and directions of Messrs. Parish & Co. and if agreeably to the orders and decrees of the governments of France, Prussia, Russia, Denmark and Sweden, the goods of the appellee were prohibited from entering the ports on the continent of Europe, in the North Sea and Baltic, yet there might have been such * occasional suspension of them, or relaxation in the inforcement of them, as to render the information and advice of Messrs. Parish & Co. of the first importance. And it would seem to have been in such a state of things, that the appellee wished to have the benefit of their superior intelligence and advice, and not when it could be had, to trust to the discretion of the master, who could not be so well informed. If there was a port on the continent of Europe, in the North Sea or Baltic, open to the admission of the appellee's goods, the master was bound to go there, before freight could be earned; it was the contract of the owners with the appellee, and he had a right to stand upon it. And the master could not entitle them to freight by going to England, and there delivering the goods. either contrary to, or without the advice of Messrs. Parish & Co. unless he was cut off from all communication with them by the unsettled state of affairs at the time. What then was the course pursued by the master? In his letter to Messrs. Parish & Co. of the 13th of July, 1810, he informed them of the capture of the ship by a Danish privateer, and that he was taken into a Danish port for adjudication; spoke of his having property on board belonging to the appellee, and asked advice and information, but said nothing of the consignment of the goods to them. That letter does not appear to have been received. In his letter of the 14th of September, 1810, he informed them, that he had craved their advice in his preceding letter, respecting his future destination, but added, that a more extensive knowledge of prize cases induced him to believe, that if he was in possession of it, it would be of no advantage. Thus virtually dispensing with any advice from them upon the subject; and upon that assumption he seems to have acted, as there is nothing to show, that he ever afterwards sought any advice or information from them in relation to the destination or disposition of the appellee's goods. In that letter he advised them, that a considerable part of the cargo was to their address, without saying to whom it belonged, or giving any account of the amount or character of the goods. On the 13th of October, 1810, he received an answer from them to his letter of the 14th of * September, dated the 2d of October, and received in eleven days after it was written. In this letter, they requested him to inform them, who were the shippers of the consignment to their address, and to forward any letters he might have for them, with any other information that might be useful, suggesting difficulties respecting the future destination of the ship, in the event of her being liberated, but that

there was time enough to correspond on that subject, after being informed of the cargo on hand, and at the same time telling him, that several of their friends had proceeded from Gottenburg to Carlsham, there to unload their cargoes, &c. On the 14th of October he acknowledged the receipt, on the preceding day, of that letter, informed them for the first time of the quantity and description of the goods to their address, and that they were shipped by the appellee, and that he was in daily expectation of his sentence, of which they might depend upon being immediately advised. On the 30th of October they answered that letter; told him they were anxiously awaiting the result of the proceedings in the Court of prize; referred him to the public papers for the late French and Danish decrees, and told him that under existing circumstances, it was difficult to point out a proper port of discharge, so many changes were taking place, but that if any further alterations should take place, they would keep him informed. In his letter of the 8th of November, 1810, he advised them of the liberation of the vessel, and the restoration of his papers, on the 5th of the same month, by sentence of the prize Court, and of his determination to discharge the cargo at Flekkefiord, where the ship was then lying. Thus announcing his determination not to seek or await any instructions or advice from them, relative to the disposition of the cargo, but to act upon his own judgment. And on the 10th of the same month, he acknowledged the receipt of their letter of the 30th of October, eleven days after it was written; and after regretting that it contained no information to induce him to alter his determination to unload at Flekkefiord, told them he intended to commence doing so on the Wednesday following—and afterwards without consulting them on the subject, or giving them any *intimation of his intention to do so,

171 sailed for Hull, where he unloaded the cargo.

Resting here, there is not a tittle of evidence to show a compliance by the master, with his instructions; but on the contrary, the whole of it has the opposite bearing. In his first letter to Messrs. Parish & Co., he informs them of the capture of his ship; in his second he tells them, that his knowledge of prize cases, induces him to believe that their advice in relation to his future destination, would be of no advantage to him; and in his third, he for the first time, (and that only in compliance with their request, contained in their answer to his second letter,) discloses to them, the quantity and description of the goods to their address, and the name of the shipper—and although requested in the letter to which that is an answer, to forward to them any information that might be useful, and also told that it will be time enough to correspond on the subject of his future destination, after they should be informed by him of the goods he had on hand, he neither communicates to them the nature of his instructions, nor asks their advice. In his fourth, he announces to them the restoration of the ship and papers, and that no appeal was

made, and also his determination to discharge the cargo at Flekkefjord. But it does not appear, that he forwarded the letters of instruction to them, from the appellee with which he was entrusted, notwithstanding his saying, that the papers were restored to him on the 5th of November, and their request in their first letter, that he would forward any letters he might have for them, and in his last letter to them, he reiterates his determination to unload at Flekkefjord, and tells them that he intends commencing it on the Wednesday following, though they had before suggested to him, that some of their friends had proceeded from Gottenburg to Carlsham, here to unload their cargoes; and speaking of the frequent changes that were occurring, had promised in their letter of the 30th of October, to keep him informed of any changes that might take place in the state of affairs. And with a view to those frequent changes, that very unsettled state of affairs it was, that the shipment was made, and his instructions given him to * consult with, and be governed by the advice of the Messrs. Parish & Co. But having as early as the 14th of September, 1810, brought his mind to the conclusion, that the advice of Messrs. Parish & Co. would be of no service to him, and acting upon that assumption, he manifestly determined, not to throw himself upon them for information or instructions, but to take the disposition of the cargo upon himself. And he did do it, regardless of their suggestion, that some of their friends had proceeded from Gottenburg to Carlsham, to land their cargoes, their promise to keep him informed of any changes that might take place in the state of affairs, and their intimation of a correspondence to be opened, after they should be informed by him of the goods on hand, all which was before the vessel had been liberated; his advice which event was accompanied by the information that he had determined to discharge the cargo at Flekkefjord, and followed two days later by the information, that he should begin unloading the Wednesday following, without asking any advice or information on the subject, which added to his having withheld a disclosure of his own instructions, and neglected to forward the letters of instruction to them from the appellee, and thus kept them in a state of ignorance that he was acting under their direction, was calculated to induce the belief, that he was acting by authority, seeing that he withheld himself from all other communication with them, and sufficiently accounts for their not writing to him again, in the absence of proof of any other cause. At the time of the liberation of the William Wilson, all the ports on the continent of Europe on the North Sea and Baltic, were, in fact, closed by municipal regulations, against the admission of a vessel and cargo in her predicament, and she was expelled from the ports of Norway, by the orders of the Danish Government, so suddenly after her liberation, as not to allow time for a further correspondence between the master and Messrs. Parish & Co., and he was prevented from communicating with them, by the situation of affairs,

and not by his own act or conduct; he would, under such circumstances, to be found by the jury, and by force of his letter of instructions, have * become the special agent of the appellee, and by
173 proceeding to Hull, in England, and there accepting that part of the cargo which belonged to the appellee in fulfilment of the contract, have entitled the owners to freight, and the Court should have so instructed the jury, if there had been any evidence in the cause to justify such a direction. But we can discover no such evidence.

If it should be conceded that that part of the deposition of James Dooley, relied upon for that purpose, was legal evidence, which is not very clear, being only evidence of what he heard a pilot say, there is nothing in it to sustain such a direction. The most that can be made of Dooley's testimony is, that about the 10th of December, 1810, the master went on board of the ship accompanied by a pilot, who directed her to be got under way, and said he had received orders from a custom house officer to take her to sea that night. Now there is nothing in this, tending in the slightest manner to prove, that the ship was expelled from the port of Norway by the orders of the Danish Government so suddenly after her liberation, as not allow time for a further correspondence between the master and Messrs. Parish & Co., and that he was prevented from communicating with them by the situation of affairs, and not by his own act or conduct. The ship was liberated, as in shewn by the letter of the master himself, of the 8th of November, 1810, on the 5th of that month, and according to Dooley's deposition, was taken to sea by the pilot about the 10th of December, thirty-five days after her liberation; during the whole of which time, she was permitted by the state of affairs, to remain at Flekkefiord. It is also shewn by letters of the master, that in answer to letters addressed by him to Messrs. Parish & Co., after the capture and during the detention of the ship, he received two letters from them, in eleven days after their respective dates. Dooley's testimony then, so far from tending to prove, or affording the slightest ground for the inference, that the ship was expelled from the ports of Norway so suddenly, as not to allow time for a further correspondence between the master and Messrs. Parish & Co. if it proves any thing, clearly establishes the

174 contrary hypothesis, by shewing that the she was * permitted to remain at Flekkefiord thirty-five days after her liberation; quite long enough for a communication with Messrs. Parish & Co., as it only required eleven days for a letter to pass between them—during which time, the master, if he had been so disposed, might, as it was his duty to do, have opened a correspondence with them, relative to the disposition or further destination of the appellee's goods. And so far from there being any evidence to show, that his not seeking the advice of Messrs. Parish & Co., was owing to the situation of affairs, which prevented his communicating with them, the whole of the evidence lies the other way. His telling them in

his second letter, that their advice would be of no service to him, and never afterwards seeking it; and his following up that with his letters of the 8th and 10th of November, in the first of which he advises them of the liberation of the ship, and determination to land the cargo at Flekkefjord, and in the other, of his intention to commence unloading on the Wednesday following; and the evidence of Dooley, that in the month of October or November, before the vessel was released, he heard him and Thomman, the supercargo employed by the other shippers, say, that they had united in the determination to proceed to Hull in the event of the liberation of the ship, with the additional circumstance, that he made no effort to obtain their advice, during the thirty-five days that the ship was permitted to remain at Flekkefjord after her liberation, and strongly to prove his fixed determination, not to submit himself to their directions, but to act upon his own judgment and responsibility. The hypothetical direction, therefore, which was asked for by the prayer set out in the fourth bill of exceptions, was properly refused, being an abstract proposition, not arising out of the evidence in the cause.

Whether the ship owners were, under the circumstances of the case entitled in equity and good conscience, to retain the money received on account of freight, was clearly a question not to be left to the jury, but proper only to be decided by the Court.

* We concur, in opinion, with the Court below, on the second, third and fourth, bills of exception, but dissent from the opinion expressed in the first exception, and

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Reverse the judgment, and award a procedendo.

BOWIE, use of LADD *et al.* *vs.* DUVALL.—December, 1829.

Statute 3rd and 4th Anne, ch. 9, declares that promissory notes shall be assignable or endorsable over in the same manner as inland bills of exchange are, or may be, according to the custom of merchants; and power is by the same statute given to endorsees, to maintain actions against the drawers, or prior endorsers of such notes, in the same manner as in cases of inland bills of exchange. (a)

Under this statute, bills of exchange and promissory notes are placed on the same footing, and the law applicable to bills, is in general applicable to promissory notes. (b)

(a) Only such notes are within the statute for the purpose of assignment as are payable to A. B. "or order," "or bearer," &c. *Noland vs. Ringgold*, 3 G. & J. 176. See *Rev. Code*, Art. 64 sec. 41, whereby the assignee of a note *in action* is enabled to sue in his own name.

(b) Approved in *Maryland Co. vs. Newman*, 60 Md. 586. Such promissory notes as are within the statute are made commercial instruments, and when they are made payable to order or bearer, they are indorsable and transfer-

When a bill of exchange is endorsed in full, all the legal interest is transferred to the endorsee, and having the legal interest, he alone is qualified to maintain an action on such bill. He cannot use the name of the payee, because the payee having transferred his interest, can have no competency to maintain an action. (c)

So where it appeared that the note of the defendant, payable to B. or order, had been endorsed as follows, "I assign the within for value received, to L;" signed B. but which endorsement was erased just before the jury was sworn; it was held that an action in the name of B. originally instituted for the use of L. could not be maintained, upon the note, as there was no evidence from which the jury could infer that the payee and plaintiff was the holder of the note; neither could an action be maintained on the money counts, although there was proof of an express promise to pay the sum demanded in such suit, as that must be considered as enuring to the benefit of him who had a right to the note.

If a note duly endorsed in full, should, in the regular course of commercial dealing, come back to the hands of a prior endorser, or of the payee, it would be competent for such person as the holder, to strike out the endorsement, and sue in his own name. (d)

English decisions made since the Revolution, have no authoritative force here. (e)

In an action against the maker of a note, payable at the house of the payee and plaintiff, on a certain number of days after date, no demand of payment is necessary to be averred or proved. (f)

able as commercial paper, and are placed on the same footing as inland bills of exchange. *Ibid.* A promissory note is a written promise, not under seal, to pay a certain sum of money *unconditionally*. If the note be wanting in this element, while it may be a valid specific agreement, and negotiable under the provisions of the Code, it cannot be treated as a valid, negotiable promissory note to be passed by endorsement. *Ibid.*

(c) Approved in *Whiteford vs. Burckmyer*, 1 Gill, 147, and *Bell vs. Bank*, 7 Gill, 233. Cited in *Ellicott vs. Ins. Co.* 8 G. & J. 169, and *Reynolds vs. Furlong*, 10 Md. 321. Possession of a note endorsed in blank will enable the holder to maintain suit on it unless *mala fides* be proved. *Whiteford vs. Burckmyer*. If a note has been transferred by endorsements, all of them in full, it can only be sued on by the special endorsee. *Ibid.* Blank endorsements may be filled up at the trial. *Ibid.* Rev. Code, Art. 35, s. 8. Where the entire interest in a bill of exchange or other negotiable *choses in action* is vested in the holder thereof he cannot institute an action upon it in the name of another party. Assignments of other *choses in action*, not negotiable, entitle the assignee to sue in the name of the assignor for the use of the assignee, or in his own name by virtue of Code, Art. 9, s. 1. *Hampson vs. Owens*, 55 Md. 583. Cf. *Maryland Co. vs. Newman*, 60 Md. 584.

(d) Approved in *Canton Association vs. Weber*, 34 Md. 671.

(e) See *State vs. Buchanan*, 5 H. & J. 260; *Koontz vs. Nabb*, 16 Md. 550; *Greenwood vs. Greenwood*, 28 Md. 381.

(f) Approved in *Wallace vs. McConnell*, 13 Peters, 149, where it was held that in an action against the maker of a note payable at a particular time and place, a demand need not be averred or proved, and that if the maker was ready, and offered, at the time and place, to pay, it is matter of defence to be pleaded and proved by him. And so in *Brabston vs. Gibson*, 9 Howard, 263, it was held that demand on the maker of a note payable at bank need not be averred or proved; failure to make the demand and damage therefrom being matter of defence.

APPEAL from Prince George's County Court. This was an action of assumpsit, brought by the payee against the maker of a promissory note. The declaration contained a count on a note drawn on the 4th of September, 1821, by the appellee, (the defendant in the court below) for \$1,387.65, payable sixty days after date, to the appellant (the plaintiff in that Court) or order; and also the common money counts. The general issue was pleaded.

1. At the trial, the plaintiff offered in evidence the following promissory note :

\$1,387.65.

Prince George's County, Sept. 4, 1821.

Sixty days after date, I promise to pay Washington Bowie, or order, thirteen hundred and eighty-seven dollars and sixty-five cents, for value received, and payable at the house of W. Bowie.

JOHN DUVALL."

The signature of John Duvall thereto, being admitted to be in the hand-writing of the defendant. The defendant then offered in evidence, that the said note had been specially endorsed by the plaintiff as follows: "I assign the within for value received, to John H. Ladd & Co.

WASHINGTON BOWIE."

Alexandria, 22d October, 1822.

The signature of the plaintiff being admitted, the whole of the said endorsement was erased just before the jury was empaneled. The defendant further proved by the docket entries, that the suit was originally instituted for the use of John H. Ladd & Co. The defendant then prayed the Court to instruct the jury that the plaintiff was not entitled to recover. Of which opinion the Court (STEVEN, C. J. and KEY and PLATER, A, J.] were, and so instructed the jury, there being no proof offered that Washington Bowie, the actual plaintiff, ever had actual possession of the note, after the special endorsement, except that the note was filed in the cause. The plaintiff excepted.

2. The defendant then, on the above evidence, prayed the Court to instruct the jury, that as the plaintiff had not averred in his declaration, that the amount of the said note was demanded by him at the house of Washington Bowie, agreeably to the * terms of the said note, and no proof of a demand was given to the jury; the plaintiff was not entitled to a verdict. And the Court being of that opinion, so instructed the jury. The plaintiff excepted.

3. In addition to the above evidence, the plaintiff proved by a competent witness, that after the institution of this suit, the defendant, in conversing with the witness relative to this suit, stated that he was making exertions to pay off the suit against him, and that he could easily do so if he was not forced to sell his property, and that he only wanted time. That he never, in any numerous conversations to the same effect, intimated to the witness that he had paid the debt, or had any defence whatever, except once, when he then stated (after the witness had refused to grant him any indulgence) that he

intended to dispute the claim, and that his counsel had been so instructed. The witness also stated, that the defendant, in April, 1825, and during the term of Prince George's County Court, inquired of the witness the number of the case on the docket, and asked the witness, if he believed the Court would continue its session until the case should be reached, and then said that if a judgment should be entered, he hoped the witness would give him a stay of execution. At this time the defendant did not say that he had any defence against the claim. The witness further stated that his impression is, that the defendant, at the time he asked for a stay of execution, was willing to have confessed a judgment. The plaintiff then prayed the Court to instruct the jury, that upon this evidence, if believed by the jury, the plaintiff is entitled to recover the amount of said note. But the Court refused to give such instruction; and were of opinion, and so directed the jury, that so long as the endorsement aforesaid remained on the note, a suit could not be brought on said note in the name of Washington Bowie. The plaintiff then prayed the Court to instruct the jury, that if the note was endorsed and delivered to John H. Ladd & Co. by Washington Bowie, that it was competent for John H. Ladd & Co. the endorsees, to have this suit brought in the name of Washington Bowie, for their use, and to authorize the striking * out the endorsement to them for that purpose. And

178 that in this case, if the suit was so brought by John H. Ladd & Co. then the endorsement being struck out after the suit was brought, the plaintiff is entitled to recover. Which instruction the Court refused to give. The plaintiff then prayed the Court to instruct the jury, that if the jury believe from the evidence, that after the suit was brought, the defendant acknowledged the justice of the claim, and promised to pay it, or confess judgment, then such acknowledgment is evidence under the money counts; and also of the plaintiff's right to recover as holder of the note. Which instruction was also refused by the Court. The plaintiff then prayed the Court to instruct the jury, that if they believe from the evidence, that after this suit was brought, the defendant acknowledged the justice of the debt for which he was sued, and promised to pay or confess judgment, then such acknowledgment is evidence under the money counts. Which instruction the Court also refused to give. The plaintiff excepted to all the refusals and opinions of the Court. Verdict and judgment for the defendant; and the plaintiff appealed to this Court.

The cause was argued at June term, 1828, before BUCHANAN, C.J. EARLE, ARCHER, and DORSEY, JJ.

F. S. Key and *J. Forrest*, for the appellant. On the first bill of exceptions, they cited 2 *Phill. Evid.* 29, (*note a*;) 11, (*note c*;) *Dugan vs. United States*, 3 *Wheat.* 173; *Chitty on Bills*, 150, (*note b*;) *Biddle vs. Gray*, 2 *H. & J.* 328.

On the second bill of exceptions, they cited *Rowe vs. Young*, 6 Serg. & Lowb. 53; *Rhodes vs. Gent*, 7 Serg. & Lowb. 84; *Bank of the United States vs. Smith*, 11 Wheat. 172; *Wolcott vs. Santvoord*, 17 Johns. Rep. 248; 1 *Chitty's Plead.* 263, 264; 3 *Chitty's Plead.* 4, (note 1.)

J. Johnson and *Stonestreet*, for the appellee. On the first bill of exceptions, they cited *Dugan vs. United States*, 3 Wheat. 172; *Chitty on Bills*, 150, (note b;); *Clark vs. Pigot*, 1 Salk. 126; *Theed vs. Lovell*, 2 Stra. 1103; *Kiersted vs. Rogers*, 6 H. & J. 282.

* On the second bill of exceptions, they cited *Wolcott vs. Santvoord*, 17 Johns. 254; *Bowes vs. Howe*, 1 Serg. & Lowb. 8; **179** *Precothick vs. Edwin*, 2 Serg. & Lowb. 470; *Gammon vs. Schmoll*, 1 Serg. & Lowb. 128; *Rowe vs. Young*, 6 Serg. & Lowb. 105; *Rhodes vs. Gent*, 7 Serg. & Lowb. 84.

ARCHER, J. delivered the opinion of the Court. The statute 3d and 4th Anne, ch. 9, declares that promissory notes shall be assignable or endorsable over in the same manner as inland bills of exchange are, or may be, according to the custom of merchants; and power is by the same statute given to endorsees to maintain actions against the drawers, or prior endorsers of such notes, in the same manner as in cases of inland bills of exchange.

By this statute bills of exchange and promissory notes are placed on the same footing, and the law applicable to bills is in general applicable to promissory notes.—*Chitty on Bills*, 335.

When a bill of exchange is endorsed in full, all the legal interest is transferred to the endorsee, and having the legal interest he alone is qualified to maintain a suit. He cannot use the name of the payee, because the payee having transferred his interest, can have no competency to maintain an action.

It is true, that if a note duly endorsed in full, should in the regular course of commercial dealing, come back to the hands of a prior endorser, or of the payee, it would be competent for such person as a holder to strike out the endorsement, and sue in his own name. These positions are fully maintained by the Supreme Court of the United States, in the case of *Dugan vs. The United States*, 3 Wheat. 173, where it is said "that if any person who endorses a bill of exchange to another, whether for value or for purposes of collection, afterwards all come to the possession thereof again, he shall be regarded as a *bona fide* holder and proprietor of such bill, and shall be entitled to recover notwithstanding there may be on it, one or more endorsements in full, subsequent to the one to him, without producing any receipt or endorsement back from either of such endorsees, whose names he may strike from the bill, or not, as he pleases."

The correctness of the opinion of the Court below, as expressed in the first bill of exceptions, must depend upon the facts, whether there was any evidence from which the jury could in- **180**

fer, that W. Bowie the payee and legal plaintiff in this case, was at the time of the institution of this suit, the holder of the note upon which this action was brought. The suit is in the name of the payee and is marked to the use of Ladd & Co., to whom the endorsement had been made in full, before the commencement of the suit. Either Bowie or Ladd & Co. filed the note and directed the use. If Bowie filed the note with its special endorsement, and directed the use, it was evidence not to be disregarded, that Bowie meant the assignment should be perfected. He had in fact by so doing delivered it to Ladd & Co.; and Ladd & Co. must be considered in the absence of evidence to the contrary, as assenting to the transfer, it being for their benefit. Nor could Bowie, after the endorsement and the direction to enter it for the use of Ladd & Co., although the legal plaintiff, strike out the use, or interfere with the endorsement without the consent of Ladd & Co. It is therefore manifest even in this view of the case, that Bowie would have parted with his right, was no longer a holder of the note, and could not maintain a suit. If on the contrary, Ladd & Co. filed the note with the assignment, then the transfer was clearly complete, and the suit should have been brought in their names, as they were legally entitled to the note, and were the holders thereof. There being then no evidence from which the jury could infer that the payee and plaintiff was the holder of the note, he was not entitled to recover upon the evidence stated in the first bill of exceptions.

The views which have been submitted of the law arising out of the first bill of exceptions, disposes of the two first prayers in the third exception.

We also concur with the Court below in the opinions expressed by them on the third and fourth prayers in the third exception. If the right was in Ladd & Co. there could be no recovery by the plaintiff on the money counts; the promise to pay must be considered as ensuring to the benefit of him who had * a right to the note, **181** and if the right to the note was in Ladd & Co., any promise to Bowie was without consideration and void. Nor could the promise to pay or confess judgment, if the jury had believed in the existence of the promise, have enabled Bowie to have recovered as holder, because the right by the endorsement was transferred to Ladd & Co. who are to be considered as the holders, in the absence of testimony, showing that the note had got back to the hands of Bowie.

In the second bill of exceptions, the Court decide that no recovery could be had by the plaintiff, because he had not averred in his declaration, that the amount of the said note was demanded by him at the house of Washington Bowie, and because no proof was given to the jury of a demand. The general doctrine that where a note is payable on demand, at a particular place, the averment of a demand and proof of notice is necessary, seems to be well established law in England, as will be seen by consulting the opinions of the twelve

Judges, delivered in the case of *Rowe & Young, 2 Broderip & Bingham*, even in the case of a suit against the maker of a note. So too it was settled in that decision, that if an acceptance was made payable at a particular place, the averment of a demand and proof thereof was considered indispensable to a recovery, because in each case the place of payment according to the idea of the Judges, is made part and parcel of the contract. Such, however, were the inconveniences of the rule, that Parliament by the Statute of 2 Geo. IV, ch. 8, declared that an acceptance at a particular place, should have the effect of a general acceptance, unless the acceptance was made payable at a particular place, and not elsewhere. These English decisions, which have in part been abrogated by the Legislature, as departures from commercial usage and policy, and, where not interfered with by them, have been considered by some of her most eminent jurists, as departures from the law, [*vide Mr. Justice Bayley's and Mr. Justice Abbot's commentary on Sanderson vs. Bowes, 2 Brod. & Bing. 180,*] have no authoritative force here, because the cases in which these doctrines have been settled, have been adjudicated since our Revolution, and * are against all the analogies of the law, as was clearly demonstrated by Bayley, Justice, in his argument in *Rowe and Jeffreys*, and by Ch. J. Spencer, in *Wolcott vs. Antvoord, 17 Johns. Rep. 250.* 182

The Supreme Court of the United States, in the case of the *United States Bank vs. Smith, 11 Wheat. 175*, after adverting to the British decisions on this question say, that a contrary opinion has been entertained in the Courts of this country, that a demand on the maker of a note, or the acceptor of a bill, payable at a specific place, need not be averred in the declaration, or proved at the trial. That it is not a condition precedent to the right of recovery, and they intimate their opinion to be in accordance with such determinations. In New York, the law has been considered as settled in the same way, from the case of *Foden vs. Sharp, 4 Johns. Rep. 184*, decided in the year 1809, where the Court say "the holder of a bill of exchange need not aver a demand of payment of the acceptor, any more than of the maker of a note;" and in *17 Johns. Rep. 248*, the Court say, in commenting on this case, that such was the doctrine of the English Courts at that time, and they there decide that a demand at the place where accepted, is not a condition precedent to the right to recover, and that of course it need not be averred in the declaration. In deciding in this case, that no demand was necessary to be made, we shall contradict no decided case in this country, which has fallen under our observation. The note it must be recollected, is payable at the house of the payee and plaintiff, and is not payable on demand here, but sixty days after date. In *11 Wheat. 171, United States Bank vs. Smith*, it is decided, that if the bank at which a bill or note payable, be the holder of the bill or note, no demand will be necessary, but an examination into the state of the accounts of the maker

in bank, to see whether he has deposited funds, is all that is necessary to be done, to enable the party to recover. The same decision has been made in 12 *Mass.* 404, with the exception that no examination of the books was required. In New York, *Caldwell vs. Cassedy*, 8 *Cowan*, 271, it was decided, that the place does * not enter in-
183 to the essence of the contract, unless the promise is to pay on demand at that place, and that consequently where the note is made payable at a particular place merely, no demand is necessary to be averred. This decision meets the present case. But we would not wish to be understood as deciding this case, upon so subtle a distinction, but upon the broad ground, that when the suit is against the maker of a promissory note, no demand is necessary to be averred, upon the principle, that the money to be paid is a debt from the defendant, that it is due generally and universally, that it will continue due, though there be a neglect on the part of the creditor, to attend at the time and place, to receive or to demand, that it is matter of defence on the part of the defendant, to show that he was in attendance to pay, but the plaintiff was not in readiness to receive, which defence generally, will be in bar of damages only, and not in bar of the debt.

It is stated in *Sanderson vs. Bowes*, (14 *East Rep.* 500) that the place of payment is inserted in promissory notes as a matter of convenience to the makers, for it would be very inconvenient if they should be compelled to answer them everywhere, when it is notorious that they have made provision to answer them at a particular place. If such be the practice in England, where the makers of notes have generally their bankers, with whom funds are set apart for the special payment of their notes, the construction which prevails there, upon this clause of such an instrument, may have grown out of the commercial usages of the country. But our usages here would seem to lead to a different construction, for it is a matter of notoriety, that parties to this commercial instrument generally collect them in our cities, through the medium of the banking institutions; and they are most frequently made payable there, or at a particular place, not for the convenience of the drawer, but for the benefit of the holder, that his collection may be facilitated. And this case furnishes an illustration of the fact, for it is perfectly obvious that the home of the payee was the place of payment, here to suit the convenience of the payee, not the maker.

184 * We concur with the Court below, in every direction given by them to the jury, but disagree with them in the opinion expressed in the second bill of exceptions. *Judgment affirmed.*

WILLIAMSON *vs.* CARNAN.

After an injunction had been granted, prohibiting the defendant from obstructing a public road, the Commissioners of Baltimore County authorized the same road to be shut up. The defendant, who was the owner of the land over which the road passed, without moving, or waiting for a dissolution of the injunction, shut it up. The Chancellor excused this violation of the injunction, upon the ground that the defendant had misapprehended his rights; but ordered him to place the road in its former condition; this not being done, the defendant was brought before the Chancellor by attachment. The injunction was then ordered to be continued until final hearing, or further order; and the defendant to remove the obstructions, and for his contempt in not removing them since the previous order, was fined. From these proceedings the defendant appealed. Upon a motion to dismiss the appeal, it was held, that the order of the commissioners directing, and authorizing, the old road to be shut up, placed the premises over which it formerly run, under the control of the defendant, and gave him the same right of user of the land of that road, that he had of the rest of his estate; and that the subsequent orders of the Court of Chancery, so affected his rights and interest therein, as to form a fit subject of appeal.

(a)

Where the Chancellor entertains a doubt as to the propriety of granting an injunction at all, or where, when granted, it operates in restraint of public commissioners for the opening a road, street, or the like; or it altogether stops, retards, or embarrasses the operation of a large manufacturing establishment, or restrains a public ferry, in these and some other cases of a very peculiar nature, it has been the practice in the first instance, or on application, to appoint a very early day for the hearing of the motion of a dissolution of the injunction, and that too, either with or without answer. Per BLAND, Chan.

at where upon a defendant's own showing, the injunction operates in restraint of a right, which he has but recently acquired, or has not long decidedly and exclusively enjoyed, and there is nothing peculiar in the case, so as to require a departure from the general rule, it must, as in other cases where individuals only are restrained, take the course of the Court. *Ib.*

Whether an inferior tribunal with jurisdiction over a given subject, has proceeded to exercise it upon such subject correctly, or erroneously, or has in any respect neglected, or disregarded, its prescribed modes and forms, is not for the Chancellor to determine, where he has no revising or superintending authority over it. *Ib.* **185**

Chancery will restrain a party from doing an act injurious to an individual, or which may be prejudicial as a public nuisance; pending any judicial proceedings before those tribunals, by which the authority to do the act, or its lawfulness is to be determined. *Ib.*

(a) Cited in *Danels vs. Taggart*, *post*, m. p. 321; *Roberts vs. Salisbury*, 3 G. J. 434; *Wayman vs. Jones*, 4 Md. Ch. 511, as to the right of appeal from orders in Chancery.

APPEALS from sundry orders of the Court of Chancery. The bill of complaint in this case, was filed on the 12th of May, 1826, in Baltimore County Court, sitting as a Court of Equity, by the complainants, (now appellees,) against the defendant, (the appellant,) and afterwards, under the Act of 1824, ch. 196, at the instance of the defendant, was transmitted to the Court of Chancery. The bill states, that a certain road or highway in Baltimore County, usually known by the name of the Garrison Forest Road, has been a public road of Baltimore County, for upwards of fifty years, and for many years past has been duly and legally recognized as such, on the records of the Levy Court of said county, and has for a long time been used and travelled by the complainants, (residents and landholders in the said county,) and other inhabitants of the said county, as their nearest and most convenient road and way, from their respective farms and places of residence in the said county, to the City of Baltimore, the principal and most important market in the said county. That on the 18th of April, 1825, John M. Wyse, (one of the complainants,) was duly appointed supervisor of the said public road, by the Levy Court of the said county, as by the warrant exhibited. That the said Wyse duly accepted the said appointment, and took upon himself the performance of the duties thereof, and that he hath never resigned his said appointment, nor hath any other person been appointed supervisor of the said road, or any part of it, of which he was so appointed; and as such supervisor, it was, and is his duty to clear, amend, and keep in good repair, the said public road, and not to permit or suffer any fallen trees, or * other obstructions, within his power, to remain in or
186 across the said road, whereby any wagon, &c. may be obstructed for the space of two days together. That the justices of the Levy Court of the said county, without any such application, proceedings or proof being made to and before the said Levy Court, as is and are required by law, and by the Acts of Assembly in such case made and provided, and without any lawful authority or good right so to do, on the 10th of April, 1826, made and passed an order of the said Levy Court, to close and shut up a part of the aforesaid public road, to wit, all that part between a point or place near to a stream called the Western Run, where a new road has been commenced, and the Baltimore and Reister's Town Turnpike Road, nearly opposite to John Armstrong's gate, in the said county: and although the complainants have applied for and obtained, and caused to be duly served, a writ of *certiorari* directed to the said justices of the Levy Court, commanding them to certify the record of the said order, and of the application and other proceedings on which the said order was made, with all things touching the same, to the Judges of Baltimore County Court, as a Court of common law, for the purpose of having the same heard, adjudged and determined as to law and justice, shall appertain; yet, so it is, that a certain David Williamson,

junior, (the defendant and appellant,) well knowing that the said order of the Levy Court was irregularly and improperly passed, but pretending and alleging that the land over which the said road passed, belongs to him, although no part of it had ever been in his possession, and without any good right or lawful authority so to do, has proceeded by himself and his agents and servants, to obstruct and shut up the part of said public road described in the writ of *certiorari* aforesaid, by erecting fences and walls of wood and stone, and placing other obstructions on and across the said road, so as to entirely stop and prevent the complainants from travelling on or using the same, as they were heretofore accustomed, and yet have a right to do; thereby causing great inconvenience and injury to the complainants. That the said Wyse, when in pursuance of his duty as supervisor * of the said road, was proceeding to remove the said fences and other obstructions, from and out **187** of the said road, and clear the same, as by law directed, the said Williamson forcibly and with violence, prevented him from opening and clearing the said road, and wholly refused, and still refuses to permit him to perform his said duty as supervisor, and threatens to use personal violence to and against him, and every other person who shall attempt to open and clear the said road, or to remove any of the fences or other obstructions therefrom, or to travel on or over the said part of the public road so by him obstructed. All which actings, &c. The bill then enumerates certain interrogatories to be answered by the said Williamson, and concludes with a prayer for a writ of injunction, to be directed to the said Williamson, his counsellors, &c. commanding and enjoining him and every of them, that he and they do absolutely desist from further obstructing and continuing to obstruct and shut up, all that or any part of the public road called the Garrison Forest Road, as heretofore used and travelled on, &c. and particularly that part of the said road between, &c. and also that he and they do absolutely desist from preventing by force, &c. J. M. Wyse, the supervisor of the said road, or whoever else shall be appointed supervisor of the said road, his agents, &c. from removing all obstructions whatever, from and out of the said road, and clearing, opening and repairing the same; and from preventing or hindering the complainants or their servants, or any other citizens of this State, from travelling and using the said road as a public highway, in the same manner as it has heretofore been used, until the further order of the Court in the premises; prayer so for subpoena to the said Williamson, &c.

The writ of injunction and subpoena were ordered, and issued accordingly, and were duly served by the sheriff of Baltimore County.

The answer of the defendant, filed on the 13th of May, 1826, states, that he is the owner and occupier of divers tracts or parts of tracts of land, adjacent to each other, situate, lying and being in Baltimore county, and binding in part on the eastern side of the Baltimore

188 and Reister's Town Turnpike Road, between the sixth * and seventh mile stones, and that the road mentioned in bill of complaint of the complainants, did heretofore pass transversely through the lands of the defendant to the said Turnpike Road, above the sixth mile stone, and the defendant conceiving himself greatly aggrieved and injured by the said location of the said road, made known to his neighbors, and amongst others, to several of the complainants, and especially to John M. Wyse, that he intended to make application to the Levy Court of Baltimore County to alter the location of the said road; and that on or about the 10th of February, 1823, the said Wyse, acting for and on behalf of the defendant, wrote and posted up the notice of an intended application to the Levy Court aforesaid. The answer then stated that affidavits were made by certain persons, that copies of the said notice were posted up at certain houses to which public resort was had, near the road in question, which affidavits he exhibited. That on the 21st of February, 1823, the defendant made application, in writing, to the Levy Court aforesaid, that the said road might be altered; and that the application was presented by the said Wyse to the said Court on behalf of the defendant, he the said Wyse, at the same time, urging to the Court the propriety of granting the said application to the defendant, who was then absent from the State on business. That at March Term, 1823, the said Carnan, &c. joint complainants in this cause, and a certain T. Ritter, by their petition in writing addressed to the Levy Court aforesaid, set forth that they were not opposed to the private interest of the defendant in the said projected alteration; but asked the said Court to require adequate security on the part of the defendant, to make the new piece of road every way good and substantial. That after the return of the defendant, on the 21st of July, 1823, he procured from the said Wyse and one T. H. Belt, then living in the neighborhood, a petition in writing, setting forth that it would be a public benefit to have the said road altered; and praying that the petition of this defendant might be granted. Which said petition was presented to the said Levy Court. That on the 11th of August, 1823, the

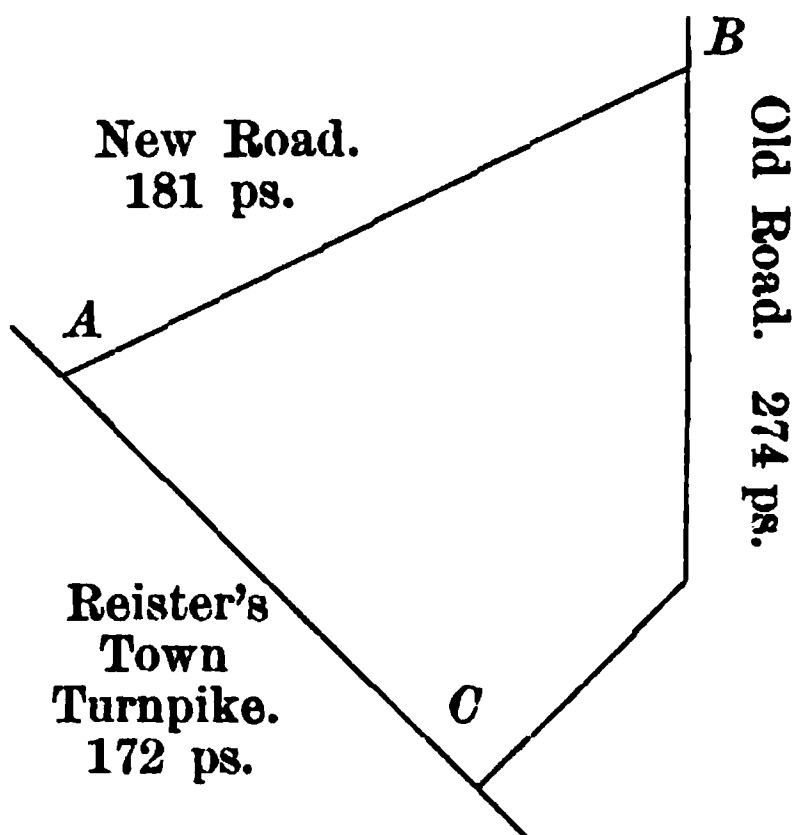
189 Levy Court caused a commission to be issued to Caleb * Merryman, &c. three respectable free holders of the county to locate a road as prayed for by this defendant. That the said commissioners met on the premises pursuant of the said commission; that on the 1st of September, 1823, the said Jehu McAllister, &c. three of the complainants, and others being then present, made a new location to the said road and caused a plot thereof to be made, and made return of all proceedings to the said Levy Court; and that on the 10th of April, 1826, the Levy Court passed an order that "all that part of the old Garrison road leading through the land of David Williamson, Jun. commencing at the letter B, (marked on the plat returned by the commissioners heretofore appointed by this Court to alter and

straighten and amend the same) and from thence to letter C, at the Reister's Town Turnpike Road, also marked on the said plat, be shut up and closed; the same having been rendered useless by the alteration and amendment made on the said road by the said commissioners, adopted and approved by this Court." That the said road so altered as aforesaid, is in every respect a shorter and better road than the old road. That immediately on the passage of the said order last mentioned, by the Levy Court, this defendant, as he conceived he had a right to do, proceeded to connect his fences and enclose his lands, and had the same actually enclosed on the 10th of April last mentioned; and that since that time he has removed a part of the inner fence, whereby the bed of the old road is thrown into a field now in actual cultivation. He admits that on the 18th of April, 1825, the said Wyse, was appointed supervisor as hath been stated; but that the said appointments are annual appointments, and that it hath not been renewed; and that under the said order of the 10th of April last past, all that part of the said road as laid down upon the said plat from B to C, which passed through the lands of the defendant, ceased to be a public road, if the same ever was a public road. The defendant charges it to be true that neither the public good, nor their own advantage, but private malice and resentment produced by other causes than the supposed injury from the alteration of the said road, have induced the said Wyse and some of his confederates to make this * attempt to injure the defendant. 190 That each and every one of the complainants hath other and better roads to mill, to market and to church, than the road heretofore passing through the farm of this defendant. He denies that the said road has been used as a public road for upwards of fifty years, or that there is any record in the Levy Court calling for a public road leading through the lands of this defendant. He admits that an application hath been made for a *certiorari* as hath been stated; but he saith that the road passing through his farm had been closed up and a part of the inner enclosure removed, before any application for the same. That the re-opening of the same, particularly at this time, would be attended with great and irreparable loss and injury to the defendant. He admits that after he had closed the said road as aforesaid, the said Wyse, not in pursuance of his duty of supervisor, as is falsely charged in the complainants' bill, and the said Wyse at the time well knowing of the order of the Levy Court of the 10th of April last, under and from whom he derived his said pretended authority, but for the sole purpose of gratifying his malice and resentment against the defendant, did attempt to pull down and remove the fence of the defendant; and the defendant possessing the power, and feeling himself justified in resisting such lawless invasion of his rights, did prevent the said Wyse from passing over and through his farm. That no person except the said Wyse, and M. Turner, (also one of the complainants,) which said Wyse is not at this

time a freeholder in the said county, have ever attempted or requested permission to pass through the farm of the defendant—another and a better road having been previously provided. He admits he has closed the road referred to from B to C, as designated on the plat. He also admits that for some years, but cannot state how many, the said road had been occasionally used by the neighborhood; and that he claims title to the land over and to the land on both sides of which the said road passes, by purchase, and has been in possession thereof several years. He denies all and all manner of combination, &c. Prayer that the said injunction may be dissolved, &c.

191 * The defendant exhibited the several documents, &c. referred to in his answer.

THE PLAT REFERRED TO.



The proceedings having been transmitted to the Court of Chancery as before mentioned, the defendant on the 15th of May, 1826, by his petition to the Chancellor, stated, that the continuance of the injunction heretofore issued will be attended with great and irreparable damage, loss and injury to the petitioner. He therefore prays, that the Chancellor will pass an order limiting an early date for the hearing the motion, (which he had entered on the docket,) to dissolve the injunction.

BLAND, C. 15th May, 1826. In cases where the Chancellor entertains a doubt as to the propriety of granting an injunction at all, or where, when granted, it operates in restraint of public commissioners for the opening a road, street, or the like; or it altogether stops, or retards, or embarrasses the operation of a large manufacturing establishment, or restrains a public ferry, in these and some other cases of a very peculiar nature, it has been the practice in the first instance, or on application, to appoint a very early day for hearing of

the motion for a dissolution of the injunction, and that too, either with or without answer. But according to the defendant's own showing, in this case, this injunction operates in restraint of a * right which he has but recently acquired, or has not long decidedly and exclusively enjoyed. There being, then, nothing in this case of so peculiar a nature as to require a departure from the general rule, it must, therefore, as in other cases where individuals only are restrained, take the course of the Court; and the foregoing petition is hereby dismissed with costs. **192**

Afterwards, on the 25th of May, 1826, the Chancellor, on motion of the defendant, passed an order, that the motion to dissolve the injunction, stand for hearing at the next term, provided a copy of the order be served on the complainants, or their solicitor before, &c. The copy was duly served.

BLAND, C. (September Term, 1826.) This case standing ready for hearing, the motion to dissolve the injunction, and the solicitors for each of the parties having been heard, the proceedings were read and considered.

There can be no doubt, from the Act of 1821, ch. 152, that the Levy Court of Baltimore County have the jurisdiction and power of "opening a new road, or of vacating or altering an old road." Whether that tribunal has, in this instance, proceeded to exercise its jurisdiction upon this subject correctly or erroneously; or has, in any respect, neglected or disregarded the prescribed modes and forms, is not for the Chancellor to determine; because he has no revising or superintending authority over it.

The object of the injunction was not to touch or impeach the jurisdiction of the Levy Court; but to stop the further proceedings of the party, upon the ground, that there were some circumstances in the case which showed, that he ought not to be permitted to do the act complained of, until it had been finally directed or sanctioned by that jurisdiction, or superior and controlling authority.

It appears, that the Levy Court, on the 10th of April, 1826, passed an order directing the road in question to be closed; and also, that on the 14th of the same month, the complainants obtained a writ of *certiorari* to remove the proceedings of the Levy Court into the County Court for their revision. It does not distinctly appear, that the order of the Levy Court was of * such a nature, that its execution could not be suspended by a writ of *certiorari*, until the matter thereof could be heard and decided upon by the County Court. It is no where in the bill or answer, spoken of or stated to be an order of that character. And whether the County Court have the power to suspend, revise or reverse such an order, is not for this Court to determine. That the writ of *certiorari* did issue, has been admitted; and for aught that appears, is still depending. It appears that the defendant did obstruct the old road, while the question for **193**

vacating it, was still *sub judice*; after the Levy Court had passed their order, but before it had been affirmed or decided upon by the County Court, to which it had been carried by the writ of *certiorari*; and therefore, he was properly restrained by the injunction. For although this Court has no power to revise the proceedings or to correct the errors of the Levy Court, or the County Court; yet, it will restrain a party from doing an act injurious to an individual, or which may be prejudicial as a public nuisance, pending any judicial proceedings before those tribunals, by which the authority to do the act, or its lawfulness is to be determined. If the County Court shall determine upon the return to the writ of *certiorari*, that the order of the Levy Court of the 10th of April, was final and conclusive; or that it be affirmed; or that the writ of *certiorari* be quashed, then the defendant will stand justified under that order, in going on to obstruct and close the old road, in question, so far as it passes over his land; and this injunction must be dissolved. If on the contrary, the County Court shall reverse or annul the order of the Levy Court, the restraint upon the defendant must be continued. It is proper that the parties should be held in their present situation to await that decision.—Ordered, that the injunction be continued until the hearing, or further order.

At December Term, 1827, the defendant by his petition to the Chancellor, prayed leave to amend his answer, &c. But the Chancellor refused the leave, and dismissed the petition. At the same term, the complainants, by their petition, stated that it would appear by the annexed affidavits, that the defendant had totally disregarded the injunction, and caused the road * therein mentioned, to
194 be obstructed, &c. Prayer for an attachment against the defendant, and that he may be compelled to place the same road in the same situation as it was previously to his closing the same on the 13th of the present month.

An attachment was accordingly ordered and issued returnable forthwith; and the sheriff returned the said writ, that he had attached the defendant.

At March Term, 1828, the complainants again by their petition stated, that the defendant, disregarding the said injunctions, did by his agents, servants and himself, cause the road mentioned in the injunction, to be obstructed on or about the 13th of December last, by causing fences, &c. to be erected, and placing other obstructions on and across the same, &c. as will appear by the affidavits filed on the last term. That although an attachment issued, and was duly served on the defendant, it had not had the effect of causing him to remove the instructions then existing; but as would appear by the annexed affidavit, he had additionally obstructed the said road, &c. Prayer for an attachment against the defendant, and that he be compelled to place the said road in the same situation as it was previously to his closing the same on or about the 13th of December last.

An attachment was again ordered and issued, returnable forthwith: and was duly served, &c. The defendant appeared and filed his petition, in which he stated, that the proceedings of the Levy Court in reference to the said road, having been set aside by Baltimore County Court, upon the hearing and examination thereof, under the writ of *certiorari*, which had been issued, &c. as will appear by a transcript of the proceedings exhibited; not upon the merits of the case, but for defect of form, as will appear by a copy of the opinion of the said Court. That the petitioner being advised that that part of the said road called the Garrison Forest Road, mentioned in the proceedings, having become a public road and highway, he, together with other petitioners, taxable inhabitants of the county, made a new application to the Levy Court, to alter and close the said part of the said road; and that the complainants had notice thereof, and attended a meeting of the commissioners * appointed under the said application, and opposed to the confirmation of the return made by the said commissioners. That on the 19th of December, 1827, an order was passed by the commissioners of the county to whom the powers and duties heretofore exercised by the Levy Court, have been transferred, that all that part of the fore mentioned road be shut up and closed; and that the petitioner, or any other person or persons, through whose lands the said old road may have been departed from, by such altering, &c. be authorized to shut up and close the same, as by reference to a copy of the said proceedings exhibited will appear. That the complainants had knowledge of the said order of the said commissioners, and that the said order being final and conclusive without appeal, and no writ of *certiorari* having been applied for, and the said road authorized to be closed, passing transversely through the farm of the petitioner; and the complainants, by the altering of the said road, having another and a better and shorter road, and the petitioner being greatly aggrieved by the passing of the said road through his lands, and conceiving himself fully authorized to do so by the said order, he, by virtue of the said order, and not as he claims, in contempt of the Court, did proceed to close the said road; and that he shut up and closed the same without force, &c. and before any attachment had issued against him. That since he has closed the said road, he hath removed his inner fences, and planted an orchard on either side of and through the bed of the said road; and that the removal of his fences will be attended with great and irreparable damage to him. Prayer that the said road may be suffered to remain closed; and that he may be released from custody, and that the attachment may be quashed.

Among the several exhibits filed with the preceding petition, was the following, being the opinion of Baltimore County Court, in May, 1827, on deciding on the *certiorari* which had been issued.

ARCHER, C. J. This Court assumes to itself no power or authority to review the judgment of the Levy Court, as to the fact, whether the public convenience required the alteration in * the road
196 mentioned in the proceedings in this case. The Levy Court is the sole and proper tribunal, to which the laws have confided the adjudication of that matter, and doubtlessly, they have upon this point made a correct determination. But whether they have been right or wrong, is not my province to determine. I cannot sit as an Appellate Court, to review their judgment. The laws in this respect have assigned to me other duties, to the performance of which I proceed. I have carefully examined all the authorities referred to, together with the Acts of the General Assembly, conferring powers on the Levy Court, and the constitution and laws giving powers to this Court, and will briefly present the conclusions to which I have arrived. It would have been satisfactory to the parties concerned, as well as gratifying to myself, to have presented particularly the reasons by which I have been led to these conclusions; but the pressure of business at the close of the term, gives me scarcely more leisure than is indispensably necessary to examine and adjudge the matter submitted to me. And in this case, I should not have reduced any thing to writing, but from a belief that some of the conclusions to which I have arrived, might, upon future occasions, be useful to the subordinate tribunals, as a guide in similar matters, which might come before them, and at the same time, inform them and others interested, of the powers and obligations of this Court, in relation to inferior judicial jurisdictions and their proceedings. In this case the following principles are adjudged and settled by this Court.

1. That every inferior jurisdiction, whether created by a public or a private law, is subject to have its proceedings inspected either by appeal or by *certiorari* and *mandamus*, where such jurisdiction acts judicially. 1 *Salk.* 146; 1 *Ld. Raym.* 580. They will be coerced to perform their duties, and restrained and confined within their proper limits as prescribed by law.

2. That where these jurisdictions act in a summary manner, or in a new course different from the common law, a *certiorari* is the peculiar and appropriate remedy; as in such a case, a * writ of
197 error will not lie. *Greenvelt vs. Burwell*, 1 *Salk.* 263; *Com. Rep*; *Israel vs. Allen*, decided in Baltimore County Court.

3. That a *certiorari* does not go to try the merits of the question, but to see whether the limited jurisdictions have exceeded their bounds. 2 *Burr.* 1042.

4. That a *certiorari* will lie after judgment, where the jurisdiction proceeds in a summary manner, and in a course different from the common law. 1 *Salk.* 263; *Com. Dig.* 76; 2 *Burr.* 1042.

5. That a *certiorari* may issue even after judgment executed, where a limited authority has been transcended by inferior jurisdictions,

in cases where no writ of error lies, for the purpose of quashing their proceedings.

6. That in this case, the Levy Court of Baltimore County, in their power to open and alter roads, is a tribunal of limited jurisdiction, proceeding in a summary method, and in a course unknown to the common law; and that in their confirmation of the return of the commissioners, under the Act of 1821, ch. 152, in relation to roads, they act judicially and not ministerially.

7. That without the notice required by the Act of 1794, ch. 52, they have no power to open, amend, alter, change, widen or straighten a road.

8. That until a number of inhabitants petition for a road under the Act of 1821, ch. 152, they have no power to appoint a commissioner, or to pronounce a judgment on any return of commissioners.

9. That a number of inhabitants within the meaning of the law, did not petition the Levy Court in this case, till July, 1823.

10. That the notice required by law, should have corresponded with the time when a legal petition was first preferred to the Levy Court.

11. That the notice being to March Term, and no petition within the meaning of the law until July, the notice was not such as is required by law.

12. That this Court cannot presume a notice in conformity with law, when the papers and record returned show an illegal and insufficient one.

* 13. That there being no notice within the meaning of the law conferring power on the Levy Court, the whole proceedings are *coram non judice* and void. **198**

14. That the judgments and orders of the Levy Court of the 7th of October, 1823, and of the 10th of April, 1826, ought to be, and are accordingly quashed.

The defendant by his petition to the Chancellor, prayed that the injunction might be dissolved. The Chancellor directed that the motion for dissolving the injunction stand for hearing on the 13th of May following; provided a copy of his order, &c. be served on the complainants on or before, &c.

The complainants then moved the Court to pass an order committing the defendant to the gaol of Anne Arundel County, for a contempt by him committed, in not obeying the injunction.

BLAND, C. (23rd of April, 1828.) In this case, David Williamson having been brought into Court on the said attachment, and having made answer on oath to the alleged violation of the injunction; and the solicitors of the parties having been heard; and it appearing, that the acts done in violation of the injunction were done under erroneous advice, and an apprehension that he had, by other judicial proceedings of another Court, been authorized to do the same—

Ordered, that the said Williamson do now, forthwith, and with the least possible delay, entirely remove and take away all fences, stones, timber, trees, and all manner of hindrances and obstructions, which he, his agents or servants may have placed or put in or upon the said road, in the proceedings mentioned; and which he, his agents or servants were prohibited from placing or putting in or upon the said road by the said injunction. Further ordered, that the said Williamson pay all the costs of the proceedings in relation to this process of attachment; and that he stand committed until the said costs are paid.

The defendant, after paying the said costs, appealed from the above order to this Court, and entered into bond with security (which was approved) for prosecuting the appeal.

The complainants, on the 5th of May, 1828, by their petition, stated, that since the order of the Chancellor of the 23rd of **199** * April, 1828, the defendant had not removed the obstructions from the said road, and had declared and avowed that he would not obey the said order, and that he would not remove, or permit to be removed the said obstructions, &c. Prayer for an attachment against the defendant, to answer for the contempt so by him committed and wilfully persisted in, contrary to this Court, and for the continuance of the breach of the said injunction. And also, that by a special order of the sheriff of Baltimore County, may be authorized and directed to cause all the said obstructions, &c. to be removed, and the said road to be opened and cleared at the expense of the defendant, &c.

An attachment was ordered and issued accordingly, returnable forthwith; and was, on the 13th of May, 1828, returned by the sheriff, that he had attached the defendant, and had him ready in Court to answer, &c. The complainants then moved the Court that the defendant be committed to the gaol of Anne Arundel county, &c. And at the same time, the complainants, by their suggestion in writing, stated that the defendant, before the filing of his petition, and notice of motion to dissolve the injunction, had committed a breach of the injunction, and at the time of filing his said petition, was actually in custody under attachment for his contempt in committing such breach; and so continued in custody until the order of the 23d of April was passed, which order he has not obeyed; but has wilfully, and in open contempt of this Court continued, and still continues his breach of the said injunction. They therefore pray that no motion on behalf of the defendant, to dissolve the said injunction, may be heard, entertained or considered, while he is thus acting in open and wilful contempt of this Court, its orders and process. That proceedings in regard to the opening and keeping open the said road as a public highway, are now depending before the commissioners of Baltimore County, the lawful and proper tribunal to decide on the shutting up or continuing open the said road in the

first instance; subject, nevertheless, to have their proceedings in relation thereto, reviewed and reversed, or confirmed by the County Court. Prayer that the motion to dissolve the injunction, may be overruled, &c.

*The defendant, on the 14th of May, 1828, in his answer to the petition of the complainants of the 5th of May, 1828, denies the charge in the petition that he will not permit to be removed the said obstructions, &c. so by him caused to be placed in and upon the said road. That the injunction did not require any act to be done by him. He is not conscious of having violated the injunction until December, 1827. He refers to the order of the 2d of December, 1826, showing the ground on which the Court originally interfered, and refused then to dissolve the injunction. By that order he was apprised that if "the County Court shall reverse or annul the order of the Levy Court, the restraint upon the defendant must be continued." He admits after the decision of the County Court, he did not expect a dissolution of the injunction. It was the fault of the complainants that it was not made perpetual. The answer then sets out the proceedings of the commissioners of the county, under the defendant's new application, &c. and avers that the order of the commissioners justified his acts of December, 1827, and would not have been any contempt of this Court, even if the injunction had been made perpetual. The only effect of a perpetual injunction, would have been to prevent the defendant from claiming any right to obstruct the road in virtue of the order of the Levy Court, which had been rescinded, and could not deprive him of the right of filing a second petition, &c. He, therefore, in the month of December, 1827, did cause fences to be erected across the said road, as stated in the complainants' several petitions of the 4th of January and 9th of April last, and in which petitions the complainants for the first time prayed the Court, among other things, to compel the defendant to place the said road in the same situation that it was previous to his erecting the same, "on or about the 13th of December last." That the acts done on or about the 13th of December last, are the only breaches of the injunction of which the complainants at the time of filing their petition had complained. On the answer of the defendant to the said petition, the Chancellor proceeded to pass his decree on the whole matter thereof. He refers to the decree of the 23d April, 1828, and insists that even if the erection * of such fences and obstructions as those charged in the several petitions of the 4th of January and 9th of April, could be considered an attempt of the Court, he is not now to answer for it, as he has already been before the Court to answer the said charges, and the same have been adjudicated. The said petitions prayed that the defendant should be compelled to place the said road in the same situation it was on or about the 13th of December last, and did not require, nay, may be construed to forbid him to remove any obstruc-

tions, &c. of an earlier date—none others had he ever been required to remove. Those which had been placed there before the granting of the injunction, the Court upon the *ex parte* application of the complainants, could not command him to remove. The language of the injunction was to desist, and did not and could not command him to do. That the first order of this Court, whether in the form of an injunction or of a decree in the premises, commanding the defendant to remove or take away any fence, stones, &c. is to be found in the decree of the 23d of April, 1828. This decree the defendant admits has not been executed by him. He has prayed an appeal from it; has given bond with approved security, and insists that the same operates a stay of all further proceedings until the same is affirmed, or the defendant fails to prosecute it. That the execution of the decree at this time would deprive him of every benefit, that by a reversal of it, should it be reversed, he would gain, &c. Prayer to be dismissed.

BLAND, C. (20th of May, 1828.) The defendant having been brought before the Court in custody, by an attachment upon a charge of contempt, in having committed a breach of the injunction heretofore granted in this case; and the motion for a dissolution of the injunction standing ready for hearing, the solicitors of the parties were heard in relation to both of those matters, and the proceedings read and considered.

A brief review of this case seems to be necessary to a correct understanding of the matters now to be decided upon. [The Chancellor's opinion then stated the facts, proceedings, and views of the case, as before set out, and said,] it was to this state of the pleadings
202 and to arguments of this nature, *I addressed myself in the order of the 2d of December, 1826, by which the injunction was continued until the hearing on further order. The defendant, it will be seen by his answer and his motion thereon for a dissolution, did not, as it would seem, then consider an order of the Levy Court for shutting up the road, (even admitting it to have been in all respects a final, conclusive and irreversible judgment,) as having of itself the effect of annulling the injunction, or as virtually dissolving it, without any motion or application to this Court for that purpose. No such notion had been in any manner intimated or suggested, either in the pleadings or arguments as they were then presented to this Court; and it never once occurred to me, at the time of uniting that order, that any such notion ever had been, or would be advanced or attempted to be sustained. Indeed so far from it, the contrary is clearly deducible from the course pursued by the defendant himself. For, although he did contend, that the order of the Levy Court for closing the road was conclusive; yet, he deemed it necessary, and then came here to ask a dissolution of the injunction as soon as practicable; because, until it was dissolved by this Court, he could not take

the benefit of that legal authority which he had thus obtained from a competent tribunal; and as he distinctly alleged, the continuance of it would be attended with great and irreparable damage and loss to him. Thus expressly admitting, that so long as the injunction remained in full force, and unrevoked by this Court itself, he would not be justified in disobeying it by any authority which he could obtain from any other tribunal.

The granting of the injunction was predicated upon the fact, that the specified lands of the defendant were charged with a public servitude as a highway; the defendant bottomed his prayer to be relieved from the restraint, upon the allegation, that it had been finally discharged from that servitude; he failed to sustain his allegation; and the injunction was continued.

The principle, that an injunction once granted, continues in full force until dissolved by the Court by which it has been awarded, is entirely obvious, and so necessary to preserve *harmony among the several branches of the government; and to prevent any one tribunal from being brought into collision with the legislature, or any other Court of justice which may have the power to exercise authority upon the subject to which the injunction relates, that I had supposed it never had been, or would be questioned by any one. And my order of the 2d of December, 1826, was written under this strong impression. The parties, by the proceedings as they then stood, looked to the final determination upon the proceedings of the Levy Court by the County Court, as that decision by which the right to the highway in question, was to be put at rest; and, therefore, I said, that they must be held in their then situation, to await that decision. But I neither intimated nor supposed, that the parties were, or could be restrained from pursuing any legal course whatever, for the purpose of having the right to this public road finally determined. I was aware, that if it should be in any way legally closed, either by the legislative or judicial authority, the defendant would be entitled to be relieved from the restraint which had been imposed upon him. But, I did not for a moment suppose, that this defendant, after the obligation he had admitted to himself to be under to obey the injunction, notwithstanding the legal authority he had, as he said, obtained, would at any time afterwards, attempt to disobey it, because of any other legal authority which he might believe he had obtained in any other manner than that to which he then especially referred. And, it is clear from what I then said, that I expected to hear again from the defendant as soon as he, in any manner whatever, succeeded in obtaining a final and complete legal authority for closing the road, which the injunction thus restrained him from obstructing. In short, the whole course of proceedings, antecedently to this period, so far from warranting any inference that the injunction could be virtually dissolved by any judicial proceedings, shows, that it was, notwithstanding any

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such proceedings, to be considered as in full force until dissolved by this Court itself.

On the 3d of January last, the defendant filed a petition, in which he states, that the proceedings of the Levy Court referred * to
204 in the bill, had been taken by *certiorari* to the County Court, and by that Court set aside; that he had made another application, and had obtained an order for closing this road; which order, he says, being final and conclusive without appeal, and he being greatly aggrieved by the passing of the old road over his lauds, and conceiving himself fully authorized so to do, by that order, did in virtue thereof, proceed to close it from A to B, as designated on the plot, [returned under the last order for closing the road,] and that he shut it up, without force, and without opposition from any one. And then concludes by asking leave to file an amended answer, setting forth the several matters therein stated, and that the bill be dismissed upon such terms as may seem just. This petition not being sworn to, and even if it had been sustained by an affidavit, laying no proper ground for leave to amend the answer, was, by an order passed on the next day, dismissed with costs.

On the same third of January last, the plaintiffs also filed a petition with sundry affidavits, showing that the road had been obstructed and closed by the defendant, in disobedience of the injunction, and praying for an attachment, which was ordered, issued, served, and returned executed. But the plaintiffs, as it seems, suffered it to pass off without asking to have anything done upon it. On the 9th of April last, the plaintiffs again asked an attachment against the defendant for disobeying the injunction, which was awarded; and on the 22d of April last, he was brought before the Court, in custody, when he filed his petition on oath, with a reference to the bill of injunction, answer, order and attachment for contempt. In this petition he sets forth, that the proceedings of the Levy Court which were removed by *certiorari* to the Baltimore County Court, having been there considered and quashed, he had afterwards made a new application to the Levy Court, and had obtained an order to shut up the road in question; which order was final and conclusive, without appeal—no writ of *certiorari* having been applied for. That conceiving himself fully authorized to close the old road, so far as it passed over his land, and not in contempt of this Court, he did shut
205 it up accordingly. Whereupon he prays that the * road may be suffered to remain closed, that he may be released from custody, and that the attachment may be quashed.

It appears then, by the defendant's petitions of the 3d of January and 22d of April, that he had conceived himself fully and legally authorized to close this highway by virtue of the order of the Levy Court, notwithstanding the injunction of this Court, which had positively prohibited him from closing or obstructing it in any way whatever; or, in other words, that the final order he had obtained, had

virtually, yet effectually and completely dissolved and annulled the injunction heretofore granted by this Court. The defendant made no application or motion to have the injunction dissolved after the 2d of December, 1826, until the 22d of April last. He had not even deigned to speak of the injunction, in the body of either of those petitions, in which he acknowledges and attempts to justify the closing of the road; and yet, in the first, he asks to be permitted to file an amended answer, and to have the bill dismissed; and in the second, he prays that the road may remain closed; and that he may be discharged from the attachment. If the prayer of his first petition had been literally and fully granted, and the bill dismissed; yet, that would not have dissolved the injunction, unless it had been so expressly ordered. By the second petition, this Court is, in effect, gravely asked to make a most extraordinary transit over all its own proceedings, into those of the Levy Court; to approve, and act upon them, and totally disregard its own. For, an order of this Court, as prayed, that the road should be suffered to remain closed, and that the defendant should be discharged from the attachment, most manifestly, could stand upon no other foundation than a complete affirmance of the proceedings of the Levy Court, and an entire disregard of all the previous proceedings of this Court. I never before heard of such an indirect mode of obtaining a virtual dissolution of an injunction, by bringing to bear upon it a judicial decision of another, and totally different tribunal, not exercising, or having any appellate jurisdiction over the Court, whence the injunction issued. An injunction, emanating from a competent authority, is a command of the law; and the citizen * is, as I have always understood, bound to yield implicit obedience, until the restriction has been removed **206** by the authority which imposed it. But, if the position assumed by this defendant be correct, then, instead of obeying, or moving to dissolve an injunction, a party may avail himself of various modes of getting around, or under, or over it, without being chargeable with the slightest contempt of the law. The judgment of this Court, continuing the injunction, was founded upon the proof or admission of certain facts, after hearing both parties, as to the very point, whether it ought to be continued or not. But, if it could be indirectly and virtually dissolved by a judgment of the Levy Court, upon a different case, then it might be evaded by one party, without hearing the opposite party as to the former, or any new facts, or equity which he might be able to show, as a most solid ground for its further continuance. The Court, commanding an obedience to an injunction, might thus be brought into collision with another Court, alleged to have sanctioned, or, as this defendant has said, ratified the acts in disobedience of it; in which conflict of jurisdiction, the rights of persons and of property, it is evident must suffer; while he who produced the scuffle, might escape with the spoil. Surely, such principles, which, to say the least of them, lead so directly to disorder

and confusion, ought not to be tolerated for a moment. It was upon these considerations, that I passed the order of the 23d of April last, from which the defendant has appealed, and given bond for the prosecution of his appeal. After I had in open Court, addressing myself to the argument that had been urged in support of the defendant's petition of the 22d of April last, declared, that the order of the Levy Court could not be allowed to operate as a virtual dissolution of the injunction; that it could only be dissolved by this Court itself, on motion, after hearing the parties; and that until so dissolved it must be considered as in full force, and would be enforced by attachment; the defendant, on the same 22d of April, filed his petition praying for a dissolution of it, upon which the Court, on that day, passed the order appointing the 13th inst. for the hearing of the motion to dissolve, on notice being given as directed. On the *5th of the
207 present month, the plaintiffs filed their petition, with an affidavit, in which it is stated, that the defendant had violated the injunction by causing obstructions to be erected across the road, which he had not removed as he ought to have done, in obedience to the order of the 23d of April last; whereupon they prayed that an attachment might be issued against the defendant, "to answer for the contempt so by him committed and wilfully persisted in, contrary to the order of this Court; and for the continuance of the breach of the said injunction." And they further prayed, that the sheriff of Baltimore County might, by a special order, be directed to remove the obstructions complained of. The attachment was ordered as prayed; upon which the defendant was brought before the Court in custody, on the 13th instant, the day appointed for hearing the motion to dissolve the injunction; and he then moved to quash the attachment; because an appeal had been prayed and bond given which had suspended the further proceedings of this Court. On the next day, the 14th instant, the defendant filed an answer on oath to the alleged contempt; in which he claims a discharge upon two grounds. First, that the injunction only operated as a restraint from closing the road, under and by virtue of the authority of the Levy Court, referred to in the bill; but did not prohibit him from shutting it up under any other authority than the one mentioned; and secondly, that the whole subject-matter having been heretofore brought before the Court, and having been embraced and adjudicated upon by the order of the 23d of April last, has been suspended by the appeal from that order; and cannot, therefore, be now in any manner treated as a contempt of this Court.

The bill upon which the injunction was granted, as is usual in such bills, recites the colorable or pretended legal authority under which the defendant had obstructed the specified highway, contrary to law; and avers, that the pretended legal authority of the Levy Court, under which the defendant had assumed the right to act, was erroneous, and that its validity was a question depending, and then

to be decided upon by a superior tribunal; and hence, the defendant having then no * authority whatever to close the road, it there-
upon prays, in general terms, that he may be altogether **208**
enjoined from doing so. There is absolutely nothing in the prayer of the bill, nor in the writ of injunction itself, which limits the prohibition to shutting up under the order of the Levy Court, or under any other particular and specified authority whatever. Neither the terms of the prayer, nor of the writ make any allusion whatever to any judicial proceedings of any kind then depending, or thereafter to be instituted. The restriction imposed upon the defendant is as general and comprehensive as it could well be expressed. The clear and unequivocal sense of which is, that the road shall continue to be considered as a public road or highway, which the defendant shall not be permitted to close until he shall produce and show to this Court, that he had obtained a legal authority to do so. Therefore, the only question now is, whether the acts done by this defendant are such as he was prohibited from doing by the injunction? Those acts are the erection of obstructions upon this highway; now those are the very acts which this injunction does most positively and distinctly prohibit. It is true, that if the injunction had prohibited acts of one description from being done, and the party restrained had done acts of another description, he could not, as the defendant has alleged, be charged with a contempt. The injunction did not prohibit him or any other person from instituting any proceedings, or making any application for the purpose of obtaining a legal authority to close this road; and consequently such acts of the defendant cannot be regarded as a breach of the injunction. So, too, if any other person had obtained an authority to close this road, such person might have proceeded, at once, to shut it up; but, most unquestionably, this defendant cannot be allowed to do so, upon his obtaining an authority to close it, until he has first shown that authority to this Court; and upon motion and notice to the opposite party, according to the established practice, obtained a dissolution of that general and unqualified restraint which had been imposed upon him by the injunction. This first cause shown by the defendant, for his discharge, being based upon an assumed position * not warranted
by the proceedings, is therefore deemed insufficient. Indeed, **209**
the showing itself seems tacitly to admit the correctness of the charge of contempt, but for that qualification of the injunction which has assumed, and which has in fact, no real existence.

The second ground upon which the defendant rests his claim to be discharged, is, that this whole subject has been taken from this Court to the Court of Appeals. I feel no disposition to meddle in any way whatever, with appeals from this Court; and certainly shall not, knowingly or intentionally, check, control, or retard them in any manner or form, either directly or indirectly. And, therefore, until otherwise directed by the Court of Appeals, I admit, that the appeal

has entirely suspended the power of this Court to execute the order of the 23d of April last ; and consequently, that the defendant cannot now be charged here with any contempt for a disobedience of that order. With regard to the prayer of the plaintiffs' petition of the 5th of May, instant, that the sheriff may be ordered to remove the obstructions that have been placed in this road, I deem it unnecessary, upon this occasion, to express any opinion whatever. But the injunction has not yet been dissolved, and there has been no appeal or other proceeding by which the enforcing of that command has been waived or suspended. The petition of the plaintiffs on the 5th instant, and the attachment awarded thereon, charges the defendant with contempt by acts "committed and wilfully persisted in contrary to the order." And also by "the continuance of the breach of said injunction;" or, in other words, "in disobeying the injunction and order heretofore issued in this cause." The language of the writ of attachment is, as usual, general; but so far as it is calculated to embrace a charge of disobeying the order appealed from, it is considered as improper. The defendant, as to so much, must be discharged, and that writ, so far, is hereby quashed.

The question, therefore, is reduced to this, whether or not the appeal from the order of the 23d of April last, has suspended the authority of this Court to enforce obedience to the injunction? The order of the 23d of April, is an adjudication upon * the subject-
210 matter then submitted to the Court for its decision, and nothing more. The defendant had been brought before the Court upon a charge of contempt, for having violated its injunction; and upon that charge it pronounced that judgment. The Court had the power to have committed the defendant to prison, and to have imposed a fine upon him; but, considering the erroneous advice and misapprehension under which he had acted, it imposed the lightest punishment it could select in application to the circumstances and nature of the case—which was, that the defendant should immediately himself be at the expense and trouble of removing the obstructions, and should pay the costs of the attachment. But suppose this order had been literally obeyed, and the defendant had afterwards erected other obstructions on this road, during the continuance of the injunction, the Court, on application, would certainly have had him brought before it, and punished for this new contempt; or if the defendant had neither obeyed, nor appealed from the order, then, on application, he might have been attached and punished, as well for his failure to remove the obstructions as ordered, as for the continuance of them in disobedience of the injunction. Every continuance of a nuisance, or trespass, is a new and additional subject of complaint, and each continuance may at law be made the subject of a separate prosecution or suit. The not removing the obstructions, and the continuance of them are clearly two distinct subjects. The first is embraced by the order which has been suspended by the appeal.

But the second can only be considered as a violation of the injunction, which has been in no way dissolved or suspended; because, it was that alone, and not the order, which prohibited the continuance of the obstruction. Every continuance of the obstructions is a new and distinct ground for an attachment. All contempt for the continuance of these obstructions, antecedent to the order of the 23d of April, and also during such reasonable time thereafter, within which the defendant might have complied with it, are embraced under, and to be atoned for by him, upon the terms of that order. But the specified continuances of them since, are totally distinct subjects of complaint; are new * violations of that injunction, which is admitted to be in full force; and are now to be treated and **211** considered as if nothing had occurred in disobedience of it, prior to that time. I am, therefore, of opinion, that this second cause upon which the defendant rests his claim to be discharged, so far as relates to the continuance of the obstructions, after they might have been removed as above mentioned, is as entirely unfounded as the first.

The plaintiffs have, by their petition, suggested, and also urged in argument, that the defendant, while in contempt, is not in a situation to move for a dissolution of the injunction; that his petition, asking to have a day appointed to hear a motion for a dissolution, having been filed before he had cleared himself of the contempt wherewith he then stood charged, was irregular, and that the motion cannot now be heard, until he has cleared himself of the present charges.

It is certainly true, as a general rule, that a party will not be permitted to come in and claim the benefit of that judicial authority, which he has contemned and set at naught. He must recognize its power by obedience, and clear away all imputations of contempt, before he can be allowed to ask from it any relief. But the circumstances of this case are evidently very peculiar. The nature and extent of the punishment to be imposed upon the defendant, for the breach of the injunction, with which he now stands charged, ought, and must depend, in some degree, upon the determination, whether the injunction is to be continued or not. If it is dissolved, a mere corrective fine, proportioned to the disobedience complained of, will be sufficient. If it is continued, then he should, at the least, as before, be ordered to remove the obstructions; to pay all the costs; and also to pay a fine, or stand committed, or both; which may be hereafter so increased to insure obedience. It therefore occurred to me, to suggest to the solicitors, the propriety of now hearing the motion to dissolve the injunction, in order that I might, upon the attachment, adopt the most suitable mode of enforcing obedience to the injunction, should I come to the conclusion that it is to be continued. The motion * for a dissolution, was accordingly taken up and argued; and I shall now proceed to consider and decide upon **212**

On adverting to the proceedings which have been in this case, antecedent to the 13th instant, it will be seen, that the defendant admits that he closed the road subsequently to the service of the injunction upon him ; and that he also admits he has not hitherto obtained from this Court a dissolution of that injunction. These positions are unquestioned and unquestionable. From these premises, I conceive it to be the duty of this Court, to assume and act upon the position, that this road is now open, and has not been as yet closed, so far as regards this defendant. For if the defendant were admitted, in any way, to avail himself of that shutting of it up, which has in fact been done by himself, then he would be thus suffered to take advantage of his own wrong, which can never be allowed. And from a review of this case, I also consider it proper, as regards the defendant, to assume and act upon the position, that he cannot claim a dissolution of this injunction, unless, at the time of asking it, he shows, that the closing of the road, so far as it passes over his land, has been legally and finally authorized by some competent authority ; and that the question, whether it should be closed or not, is not, at the time of hearing the motion for a dissolution, depending before any legal and competent tribunal.

The plaintiffs, by their petition filed the 13th instant, set forth and show several causes why the injunction should not now be dissolved as prayed ; and, among others, they show, that proceedings have been instituted, and are now depending before the Commissioners of Baltimore County, a legal and competent authority, for having this same highway, called the Garrison Forest Road, opened, and kept open, as it has heretofore been. As I have observed upon a former occasion, in regard to the Levy Court, whether the proceedings which have been thus instituted before the Commissioners, are as correct and regular as they ought to be, is not for this Court to determine. It is enough, that it satisfactorily appears, now, upon the hearing of this motion, that the defendant has not yet obtained a final and conclusive legal authority to close this road ; and, that he

213 * has, as yet, no right to shut it up ; because the right to do so, is, at this time, depending before, and to be determined by a legal and competent tribunal. And, therefore, until that proceeding has been finally terminated ; or rather, until the defendant can show to this Court, some good and sufficient legal authority for closing it, this injunction, by which it has been in point of law, up to this time, kept open, so far as it passes over his land, must be continued.

Ordered, that the injunction heretofore granted in this case, be, and the same is hereby continued until final hearing in, or further order of, this Court.

Ordered also, that the defendant do forthwith, and with the least possible delay, entirely remove and take away all fences, &c. and all manner of obstructions, which, having been heretofore by him, his

agents, or servants, placed or put in or upon the road in the proceedings mentioned, contrary to the inhibition of the said injunction, he has suffered to remain and continue in and upon the said road in disobedience of the said injunction, after he might have removed the same as directed by the order of this Court of the 23d of April last.

Ordered also, that the defendant for his contempt in not obeying the injunction of this Court, by continuing the said obstructions in the said road aforesaid, after the time when he might have removed the same as directed by the order of this Court of the 23d of April last, pay a fine of fifty dollars, and all the costs of the last mentioned attachment, and that he stand committed until the said fine and costs are paid.

From which last mentioned order, and also from the order of the County Court directing the injunction to issue in this cause, (12th of May, 1826,) and from the order of the Chancellor of the 4th of January, 1828, directing an attachment to be issued against the defendant, and also from the order of the Court of the 9th of April, 1828, directing another attachment to issue against the defendant, he also appealed to this Court. And, upon the defendants presenting to the Chancellor the bond which he had entered into with sureties for prosecuting the said appeal, the Chancellor on the 21st of May, 1828, issued the following order—

* Ordered, that the foregoing bond this day filed, be, and the same is hereby approved. And, in reply to the motion **214** submitted, the Chancellor declares it to be his opinion, that the said bond having been filed and approved before the actual payment of the fine and costs, as commanded by the order passed yesterday, which has been appealed from, and before the defendant had been actually committed to the custody of the messenger, to be by himself confined in jail, operates as a *supersedeas* of all further proceedings for that or any other purpose, in relation to the matters appealed from.

The said appeals being allowed, a transcript of the record was transmitted to this Court.

At June Term, 1828, on a motion made by the appellees to dismiss these appeals, it came on and was argued before BUCHANAN, C. J., BURLE, MARTIN, and ARCHER, JJ.

Gwynn, for the appellees, in support of the motion, referred to *Rowden vs. Dorsey*, 6 H. & J. 115, and *Thompson vs. McKim*, *Ibid.* 2. He insisted that the appeal from the order of the 12th of May, 1826, was too late, and cited *Strike vs. McDonald*, 2 H. & G. 191. He also insisted that the order of the 20th of May, 1828, refusing to dissolve the injunction, was a mere interlocutory order, whereby no rights were finally settled between the parties, and from which no appeal would lie.

Magruder, against the motion, referred to 1 *Madd.* Ch. 128; *Eden on Inj.* 162, 163, 167; *Co. Litt.* 56 a, and the Act of Assembly of 1794, ch. 52, sec. 14. He urged that there could be no breach of the injunction, until the decision of Baltimore County Court, under the *certiorari*. If the appellees had applied for and obtained a perpetual injunction, then the appellant might apply to the Levy Court, and obtain another order to close the road. *Denton vs. Jackson*, 2 *Johns.* Ch. 321. On an injunction to stay waste, pending an action of ejectment or trespass, it will be dissolved, on motion, unless it is shown that the complainant had succeeded at law. Here, on the decision
215 made by Baltimore * County Court, the injunction was at an end—it had performed its office. The proceedings of the Levy Court being annulled, the appellant had no right to shut up the road; but he applied again to that Court, and another order for shutting the road up was granted to him;—and he then did shut up the road. After which, it appears that the appellees applied to the Commissioners of the county, (they being substituted in the place of the Levy Court,) to open a new road where the old road had run. He contended that the orders of the Chancellor, directing the appellant to remove obstructions, &c. from the road in question, affected his rights; and that his rights were as much affected thereby, as in *Thompson vs. McKim*. If he were to remove his fences, &c. from the road, and it should be finally decided that they ought not to have been removed, how could he then be compensated for the injury he had sustained.

Taney, (Attorney-General,) also, against the motion in his argument, referred to *Attorney-General vs. Utica Insurance Company*, 2 *Johns.* Ch. 378; *Eden on Inj.* 157, 162, 163.

Gwynn, in reply, cited *Eden on Inj.* 55, 56, 162, 163. He said that the Court could not compel the party to resort to a new injunction, where the reasons for a former injunction had ceased to exist, and new reasons had arisen which would justify an injunction.

BUCHANAN, C. J. delivered the opinion of the Court. The order of the commissioners of Baltimore County, on the 13th of December, 1827, confirming the report of the commissioners appointed by the Levy Court of that county, and directing and authorizing the old road to be shut up, placed the premises over which it formerly run, under the control of the appellant to whom the land belonged, and gave him the same right of user of the land of that road, that he had of the rest of his estate. And we think that the subsequent order of the Court of Chancery, does so materially affect the right and interests of the appellant as to bring the case within the principle of
216 *Thompson * vs. McKim*, heretofore decided by this Court, and form a fit subject of appeal.

The motion, therefore, to dismiss these appeals is overruled.

Motion overruled.

EARLE, J. dissented.

TIERNAN vs. POOR, *et ux. et al.*—December, 1829.

Where the facts charged in a bill were all admitted to be true by the pleadings, and there was no replication, but the parties agreed that the Chancellor might take the papers and decide the cause; by such agreement the cause is set down for hearing, and whether the proceedings of the defendant be regarded as a plea, or as an answer, the question submitted. is on their legal sufficiency to bar the plaintiff's claim.

When any instrument of writing is designed to operate as a transfer of property, and proper and apt terms are used, whereby the meaning of the parties can be clearly ascertained, if some circumstances are omitted to give it legal validity, which deprive it of its intended, specific operation a Court of equity will set it up as a contract, or as evidence of a contract; and when the rights of innocent third parties would not thereby be affected, will, as between the parties to such instrument, carry it into specific execution; provided it be founded upon a valuable consideration. (a)

and his wife, in consideration that T. would give up a lien which he held upon P's personal property, agreed to execute a mortgage of certain real property, which, by a post-nuptial settlement, had been conveyed to trustees for the sole use of the wife, with power to her to "sell, convey and dispose of the same, absolutely in such manner as she might think proper to direct, without the concurrence of her husband, and from and after her decease, such parts of the property as should be left undisposed of, by her deed or contract," was conveyed in trust to her children. In pursuance of such agreement, T. gave up his lien, and P. and his wife executed a deed to T. for some of the trust property. The deed was in the usual form of a mortgage, except that the wife was not examined apart from her husband, by the Justice of the Peace who took her acknowledgment, and according to the Acts of Assembly passed in relation to deeds executed by *femes covert* grantors. Upon a bill filed by T. praying a sale of the mortgaged premises, the Court held, that whether the instrument of writing which forms the basis of this call, for the interposition of a Court of equity, be in fact a mortgage, in its legal and technical sense, in consequence of its not having been acknowledged in the manner which the Acts of Assembly require, it

a) Approved in *Price vs. McDonald*, 1 Md. 415, and *Carson vs. Phelps*, 40 J. 99. An equitable claim founded on an unacknowledged deed will be forced in equity, except against a *bona fide* purchaser without notice. *ice vs. McDonald*. A deed not good at law may be enforced in equity as agreement to assign. *Cooke vs. Husbands*, 11 Md. 508. In the view of Court of equity the mere formality of the charge or incumbrance is quite important, provided the intention of the parties is sufficiently manifest. *ll vs. Eccleston*, 37 Md. 521. Cf. *Hudson vs. Warner*, 2 H. & G. 310, note. trust created by an unrecorded deed, or by a contract in writing for a cific security, will be enforced in equity against the general creditors of grantor. *Carson vs. Phelps*, *supra*. See also *Hampson vs. Edelen*, 2 H. J. 55; *McMechen vs. Maggs*, 4 H. & J. 96; *Alexander vs. Ghiselin*, 5 Gill, . As to defective deeds of married women see *Gebb vs. Rose*, 40 Md. 393 *we vs. Todd*, 41 Md. 633, cited in note (b) *infra*.

217 was not necessary to determine; but it was clearly intended * to be a mortgage, and within the limits of the wife's disposing power; and therefore decreed the property mentioned therein to be sold. (b)

The title to the assistance of a Court must be exposed by the pleadings; but the style and character of pleading in equity, has always been of a more liberal cast, than that of other Courts; as misleading in matter of form there, has never been held to prejudice a party, provided the case made is right in substance, and supported by proper evidence.

APPEAL from a decree of the Court of Chancery, dismissing a bill of the complainant, (now appellant.) The original bill, filed on the 21st of February, 1822, stated that Dudley Poor, (one of the defendants,) being indebted to the complainant in the sum of \$600, and desirous of securing the payment thereof, and the interest, in consideration thereof the said Poor, and Deborah his wife, (another of

(b) Approved in *Miller vs. Williamson*, 5 Md. 234; *Cooke vs. Husbands*, 11 Md. 503, 508; *Gelston vs. Frazer*, 26 Md. 345; *Emerick vs. Coakley*, 35 Md. 190; *Hall vs. Eccleston*, 37 Md. 521; *Abrams vs. Sheehan*, 40 Md. 459. Distinguished in *Conn vs. Conn*, 1 Md. Ch. 216; *Tyson vs. Latrobe*, 42 Md. 338; *Greenholtz vs. Haeffer*, 53 Md. 186. Cf. *Price vs. Bigham*, 7 H. & J. 220; *Brundige vs. Poor*, 2 G. & J. 1.

In *Hall vs. Eccleston*, it was held that, under Code, Art. 45, sec. 2, a married woman owning a separate real estate, may charge the same with the payment of a debt contracted by herself and husband by their promissory note, in which they jointly and severally bind themselves and their separate and individual estates. The only way to enforce the contract on the part of the wife is to treat it as constituting an equitable lien or charge on her separate estate, and upon failure to pay the debt to decree the sale of the land for its satisfaction. Cf. *Wilson vs. Jones*, 46 Md. 349. In *Gebb vs. Rose*, 40 Md. 393, it is said that except in regard to the separate estate of a *feme covert* all her covenants, contracts and agreements, at law as well as in equity, are absolutely null and void, and she cannot be compelled to perform them, whether entered into by herself, or on her behalf by her husband, with or without her consent. This principle only yields to the statutory authority and mode for enabling married women to bind or bar their estates, except in those cases where, in reference to their separate estate, they may be empowered to act as *femes sole*. And where there is an omission of some statutory requirement in the deed of a *feme covert*, essential to its validity, the mistake cannot be corrected in equity. In *Grove vs. Todd*, 41 Md. 633, it was held that the deed of a married woman releasing her dower, not properly acknowledged, was utterly null and void, as against the wife, both at law and in equity, and that a curative Act of Assembly could not impart life to it. In the case in the text the deed of settlement expressly vested the wife with the power of alienation. In *Cooke vs. Husbands*, 11 Md. 492, it was held that where the instrument creating the separate estate of a married woman contains no limitation on the power of disposition, she may dispose of it as a *feme sole*, upon the principle that the *jus disponendi* accompanies the property.

As to the alienation and encumbrance of her statutory separate estate by a married woman, see Rev. Code, Art. 51, secs. 20, 30; *Emerick vs. Coakley*, 35 Md. 188; *Hall vs. Eccleston*, 37 Md. 521; *Wilson vs. Jones*, 46 Md. 349; *Frostburg vs. Hamill*, 55 Md. 315.

defendants,) on the 28th of March, 1820, executed to the complainant a deed of mortgage, by which they conveyed to the complainant a lot of ground in the City of Baltimore, on the north side Market Street, next to the corner of Gay Street, No. 50, with a proviso, that upon payment of the said sum of money, and interest, or before the 1st of July, next ensuing the date of the said deed of mortgage, the same should be void; which said deed of mortgage is averred to have been duly acknowledged and recorded on the 10th of September, 1820. That although the said 1st day of July next ensuing the date of the said deed of mortgage, and the period therein mentioned for the payment of the said \$600, with the interest due thereon, has long since passed by; yet the said D. Poor, and Deborah, his wife, have neglected to pay the said sum of money, &c. and offer for a sale of the mortgaged premises, &c. and for further relief.

The deed of mortgage exhibited by the complainant, as stated in the bill, was dated the 28th of March, 1820, executed by D. Poor, Deborah, his wife, to the complainant, whereby, in consideration of the sum of \$600, to them paid, they conveyed the lot of ground mentioned in the bill, with the proviso therein stated, with covenant for further and other acts, deeds, assurances and conveyances. The deed of mortgage was signed and sealed by the said D. Poor and wife, and acknowledged by * them before two justices of the peace, &c. on the day of its date. But there did **218** appear to have been any private and separate examination of Deborah, wife, apart from her husband, as required by the Acts of Assembly relating to conveyances, executed by *femes covert*, conveying their real estate, or relinquishing their rights of dower. The deed was recorded on the 27th of September, 1820.

In the answer of Poor and wife, admitted the execution of the deed of mortgage; but by way of plea and answer to the bill, they stated that Deborah, defendant, is one of the heirs-at-law, representatives and assigns of John O'Donnell, deceased, and as such, was entitled to one-third of the real and personal estate, as her distributive share of the said estate. That the said estate was distributed and divided among the representatives of the said O'Donnell. They further stated, that the said estate was so divided and allotted, they, the defendants, by a deed duly executed, acknowledged and recorded, bearing date on the 24th of August, 1816, did convey, &c. unto Columbus O'Donnell and John H. Poor, all their estate, and interest in the share of the estate of the said John O'Donnell, in trust for the use and separate use, benefit and behoof of the said Deborah, for the term of her natural life, so that she be suffered and permitted, peaceably and quietly, to use, &c. the said real estate, and premises thereby conveyed, and the rents, &c. thereof, and of every part thereof to receive, take and apply to her separate use, without being subject to the disposition, &c. of the said Dudley

Poor, or of any future husband of the said Deborah, and in no wise liable or answerable for the payment or fulfilment of his or their debts, contracts or engagements; and so as that the same estate and property thereby granted and conveyed, and every, or any part or parcel thereof might be sold, conveyed and disposed of absolutely, by the said Deborah, in such manner as she may think proper or direct; and that without the concurrence of her present, or any future husband. And from and after the decease of the said Deborah, then as to the whole of the same estate, property and premises thereby

219 granted and conveyed, or such parts or part thereof, * as may remain undisposed of, by deed or contract, in trust for all the children of the said Deborah, and their heirs, as tenants in common, equally. But in case the said Deborah shall depart this life, without leaving a child, or a descendant of a child, living at the time of her death, then, in trust for the use, and behoof of such person or persons, or for such uses and purposes as the said Deborah, (her coverture notwithstanding, or whether sole or covert,) shall or may, by any instrument of writing in the nature of, or purporting to be her last will and testament, direct, limit, and appoint; and in default of such limitation or appointment, then for the use, benefit and behoof of the right heirs of the said Deborah, and their assigns forever. And upon this trust, nevertheless, and with full power to the said Columbus O'Donnell and John H. Poor, and the survivor of them and his heirs, with the consent, and by the direction of the said Deborah, testified in due form, but not otherwise, from time to time, at any time thereafter, to make any lease or leases, demises or grants of the estate and property thereby conveyed, or of any part thereof, with the appurtenances, for any term or terms whatever, renewable or not renewable, so as upon every such lease or leases, there be reserved to continue payable to the said Columbus O'Donnell and J. H. Poor, and the survivor of them, and his heirs, during the respective lease or leases, the best rents that can be obtained for the same; and so as in every such lease or leases, there be contained reasonable and usual covenants, in like cases; and also a proviso or clause of re-entry for non-payment of the rent or rents thereby reserved. And these defendants further say, that the real estate specified and mentioned in the said mortgage was included in the said deed to the said C. O'Donnell and J. H. Poor, and was a part thereof. And these defendants, by way of plea, and in bar of the complainant's right to recover in the said bill, say that they are advised they had no legal right to make the said deed of mortgage, and that no legal interest or title whatever was thereby conveyed to the complainant—the legal title being outstanding in the said trustees, C. O'Donnell and J. H. Poor—and moreover, that the said deed of mortgage is defec-

220 tively executed; and even * if a legal or equitable title existed, in these defendants, that the said deed is wholly defective in its execution, and agreeably to the laws of this State conveyed no

tle, legal or equitable, to the complainant. And these defendants, therefore, pray hence to be dismissed, with their costs, &c.

The deed of trust exhibited by the defendants, was dated the 24th August, 1816, executed by them to C. O'Donnell and J. H. Poor, conveying the real estate, &c. as mentioned in the above answer and plea, and in the manner, and upon the trusts as therein stated. It was acknowledged by the defendants on the day of its date, and the same was privately examined apart from and out of the hearing of the husband, &c. and was recorded on the 21st of September, 1816. The complainant having obtained leave for that purpose, amended his bill by making C. O'Donnell and J. H. Poor parties defendants. The answer of D. Poor and Deborah his wife, to the amended bill, admitted C. O'Donnell and J. H. Poor mentioned therein, as trustees of the said Deborah in the deed of trust, are the trustees appointed the same as therein alleged.

The complainant having again obtained leave for that purpose, further amended his bill, by stating that after the execution of the deed of trust, and before the execution of the mortgage, D. Poor had rented from the complainant a dwelling house in the City of Baltimore, which house D. Poor and his family had occupied for a considerable period. That shortly before the execution of the mortgage, there was due to the complainant from D. Poor, the sum of \$600, as rent in arrear for the said house, and for which the complainant had levied a distress on the goods and chattels of the said D. Poor, then the said dwelling house, of sufficient value to secure the said rent; and, at the time of the agreement hereinafter mentioned, had and held the said distress in full force and effect. That on the 28th of March, 1820, the complainant being possessed of the said security for his rent aforesaid, the said D. Poor and Deborah his wife, agreed with him, that they would execute the mortgage filed with the original bill in this cause, for the purpose of securing the payment of the aforesaid rent, in consideration that the complainant would relinquish his said distress, and give up the said goods and chattels, levied on as aforesaid. The complainant alleges that he complied with the said agreement on his part, and the said D. Poor and Deborah his wife, in pursuance of the said agreement, executed the said mortgage, and the said goods were given up to the said D. Poor, and the said mortgage was duly recorded according to law. That the said mortgaged property constituted a part of the property mentioned in the said deed of trust; and that the complainant's claim remains unpaid. Prayer, that the mortgaged premises may be decreed to be sold, &c. and for other relief, &c.

On this amended bill, all the defendants answered, admitting the facts set forth in the said bill of complaint, to be true as stated; yet they allege and contend that the complainant is not entitled to relief; and therefore pray that the said bill may be dismissed with costs, &c.

Agreement. "It is agreed in this case that the Chancellor may take the papers and give a final decree—the counsel for both parties considering that the questions of law connected with it, having been fully discussed before his honor, the Chancellor, in a late case against the same defendants, that it is unnecessary to discuss them again." Signed by the counsel.

BLAND, C. (September Term, 1826.) From the whole proceedings the case appears to be substantially no more than this. The plaintiff, to secure a debt due to him, obtained a mortgage of certain property from Dudley Poor and wife, who by their plea allege, that prior thereto the mortgaged property had been conveyed to Columbus O'Donnell and John H. Poor, in trust for certain uses as in that deed mentioned, and therefore, that Dudley Poor and wife had no right or power in equity to make and execute the mortgage relied on in the bill. The plaintiff has admitted the sufficiency of the plea by replying to it. And the truth of the facts therein stated, which alone has been put in issue, is clearly established by the proceedings in the cause. The plea covers the whole substance and merits
222 * of the plaintiff's case, and consequently, being fully sustained in law and fact, puts an end to it altogether. Decreed, that the bill of complaint of the complainant be dismissed with costs.

From which decree the complainant appealed to this Court, where the following agreement was entered into by the counsel of the parties. "In this case it is agreed that the plea to the original bill shall be considered as a plea to the amended bills—the appellant reserving all objection to the plea itself, both in form and substance, and not admitting it to be a plea at all."

The cause was argued before EARLE, ARCHER, and DORSEY, JJ.

Gill, for the appellant, contended—1. That the deed of trust from D. Poor and wife to O'Donnell and J. H. Poor, conveyed to Mrs. Poor an equitable estate for her sole use, independent of her husband; which estate she had a right to assign absolutely or mortgage at her discretion, by the terms of the trust deed. 2. That having such right, it is bound by her contract set forth in the bill; and the Chancellor erred in not decreeing a sale of it to satisfy her contract. 3. That if there be any error in the mortgage from Poor and wife to the complainant, then upon the original contract independently and without that mortgage, the complainant having fulfilled his part of the contract, and Poor and wife having received a valuable consideration from him, he is entitled to a sale of the property described in the mortgage, to satisfy his claim. 4. That this cause is substantially before this Court, as it was before the Chancellor, upon general demurrer—the answer to the amended bill being in effect a demurrer. 5. That there was no plea filed by the defendants in this cause. 6. That if there was a plea, it was abandoned or overruled by the last

mended answer; and if not, the agreement to submit the case, was in effect, setting the plea down for hearing.

On the first and second points, he cited *Price vs. Bigham*, 7 H. & J. 296, 318. On the third point, *Williams vs. The Mayor, &c.* 6 H. & J. 533; *Hunt vs. Rousmaniere*, 1 J. Peters, 13. On the fifth point.—Is there any plea in the case? The Chancellor says there was a plea to which the complainant replied. If there was a plea to the original bill, it is admitted there is one to the amended bills. But it is denied that it was a plea at all. It is an answer, and not a plea. It is wholly deficient in the form and substance of a plea. *Mitf. Plead.* 1d. 1812,) 235, 238, 240. *Beames' Eq. Plead.* 339, 340. The defendant must plead to the whole of the bill, or a part, and then answer to the residue. The plea and answer must be distinct, and cannot be mixed together. *Ringgold vs. Ringgold*, 1 H. & G. 12. Where it is impossible to discriminate between what facts are relied on to constitute a plea, and what to constitute an answer. On the sixth point.—* *Mitf. Plea.* 254; *Chase vs. McDonald*, 7 H. & J. 178, 198. **224**

Winchester, for the appellees. This is an attempt to make the wife's separate estate, answerable for her husband's debt. The trust expressly states that the property should not be disposed of to pay the debts of the husband. The mortgage to the complainant was acknowledged by D. Poor and wife, but she was not privately examined, &c. as required by law. Was the property at the time of the mortgage, liable to the mortgage, or the contract growing out of it? The bill does not speak of the mortgage as a contract growing out of or within the deed of trust, under the power reserved to the wife to make a contract. The bill is to foreclose a mortgage, and for no other purpose. Is it a mortgage sufficient to pass the estate in the property of a *feme covert*, admitting that it was not trust property? It cannot be considered or regarded as a *feme sole*, capable of making her separate estate answerable for the debts of her husband. The mortgage is not in execution of the power reserved to the wife under the deed of trust. 2. If it is, it is such a defective execution of the power, as this Court will not aid. A *feme covert* cannot dispose of her real estate unless agreeably to the Act of Assembly; under some power reserved to her by deed, and in execution of that power. This deed cannot be considered a mortgage; nor is it an execution of the power reserved to her under the deed of trust. The case of *Price & Nisbet vs. Bigham's Ex'rs*, is not similar to the present. There the contract was for improvements to be made on the estate; and there was an attempt by her and her trustee to execute the power reserved to her. Here the wife could not contract, except in the way pointed out by the trust. She must have united with the trustees in any transfer of the property. It cannot be a contract by a *feme covert*, unless executed agreeably to the Act of Assembly, or according to the power reserved to her under

the deed of trust. The estates of *femes covert* are strictly protected. This is not such a defective execution of the trust as will be aided by this Court. No such case can be found where it was ever done.

The question relative to the plea will occur in another case against the same defendants, and will be there argued. But there is a plea, and there was a general replication to it. The Chancellor says so, and he is presumed to know the state of his own records.

Gill, in reply.

226 * ARCHER, J. delivered the opinion of the Court. It will not be necessary in this case, to determine whether the defence of the defendant is partly an answer, and partly a plea in bar, or whether it is a plea in bar supported by an answer, or, if a plea, whether it is overruled by the answer. These questions not necessarily arising on the record; no replication has been filed, and the cause has been set down for hearing by agreement of counsel upon the proceedings in the case; if it be an answer, upon bill and answer, if a plea, then upon the bill and plea, in either case, all the facts set forth in the bill are admitted to be true, not by setting the cause down for hearing, but by the pleadings in the cause, and if the defence be in fact a plea, the cause having been set down for hearing, the question is submitted on its legal sufficiency to bar the remedy which the complainant seeks.

The facts of the case appear to be, that Dudley Poor was indebted to Luke Tiernan, in the sum of six hundred dollars, for rent in arrear—That for the purpose of securing the amount due, Tiernan levied a distress upon the goods of Poor—That to relieve his property from this lien, thus acquired by Tiernan, Poor and wife agreed with him that they would execute the paper, purporting to be a mortgage, filed with the proceedings, and Tiernan, in consideration thereof, agreed to give up his distress—That upon the fulfilment of the agreement on the part of Poor and wife, the goods levied upon were given up, and his lien by distress surrendered.

That the property upon which the mortgage operated had belonged to Mrs. Poor, and had been conveyed by a deed of trust, on the 24th of August, 1816, by Poor and wife, to Columbus O'Donnell and John H. Poor, for the sole and separate use of Mrs. Poor, during life, and in no wise answerable for his debts and engagements, with a power to her to sell, convey and dispose of absolutely, in such manner as she might think proper to direct, without the concurrence
227 of her husband, and from * and after her decease, such parts of the property as should be left undisposed of by her deed or contract, was conveyed in trust to her children and their heirs, as tenants in common.

In the case of *Price & Nisbet vs. Bigham's Ex'rs*, the question was presented how far it was competent for a married woman, by a con-

tract under seal, to charge the payment of a debt on her real estate, which was settled on her by a deed of trust for her separate use, with power to sell and convey and absolutely to dispose of the same, by deed duly executed by her, her coverture notwithstanding, and in delivering their opinion on this point, the Court after stating that by the express terms of the trust, she might pass her lands by deed, and they emphatically ask if this power exist, "how can the power to encumber it by mortgage or charge it by contract, be denied to her?" The law allows her, notwithstanding her coverture, to part with her whole estate, upon the principle, that in doing so, she acts as a *feme sole* as to her separate property, and upon the like principle, and to promote fair dealing, it must be conceded to her to mortgage and encumber it with her debts.

Whether the instrument of writing which forms the basis of this bill for the interposition of a Court of equity, be in fact a mortgage, in the legal and technical sense of that term, in consequence of its not having been acknowledged by Mrs. Poor in the manner, in which the Acts of Assembly require the acknowledgment of *femes covert* to be made, it is not necessary to determine. Nor do we mean to formulate any opinion upon the subject. For the principle is a well settled and familiar one, that where any instrument of writing is signed to operate as a transfer of property, and proper and apt words are used whereby the meaning of the parties can be clearly ascertained, if some circumstances are omitted to give it legal validity, whereby it is deprived of its intended specific operation, a Court of equity will set it up as a contract, or as evidence of a contract, and where the rights of innocent third parties would not thereby be affected, will, as between the parties to such instrument, carry it into specific execution, provided it be founded upon a valuable consideration. 2 P. W. 242. The * deed in this case was clearly intended to be a mortgage to secure the payment of the complainant's debt, and was no doubt meant by the parties to be clothed with all the solemnities and solemnities necessary to give it a legal and effective operation as such. Its design and meaning was to secure a particular debt, and to charge it as a lien on the wife's separate property. If it be deprived of legal validity for the want of a privy examination, we are still at liberty to look at it as illustrating and evidencing the agreement of the parties, and will coerce its execution according to its original design. Such a course would be demanded by the first principles of equity. For what could be more inequitable than to permit a party to escape from the fulfilment of his contracts, by the mere omission of legal forms?—in which omission too, he may have been the sole actor, and in all cases a participator, and to allow him reap the advantages from such omission, of all the consideration which constituted his inducement, for entering into the contract. A voluntary contract could neither be coerced in equity, nor could advantages from it be obtained at law. And this leads us to the

enquiry, whether the consideration here was valuable, and of this there cannot be a question entertained. The admission in the cause shew that the complainant surrendered his lien on the property distrained in consideration of the security, which he and all the parties to it believed he had obtained by the mortgage. It was the mere substitution by consent of one security for another, and if relying on the acts of the parties, he has relinquished a certain indemnity, and is now to be told, that his security taken in return, and intended as an equivalent, is gone, the result would be, that equity would enable them to perpetrate a fraud.

But it is said that the wife was not benefited by any of these stipulations. It is not necessary that she should have been. It is sufficient, acting with her property as a *feme sole*; that she contracted to pass it for her husband's debts, on condition that a benefit should be bestowed upon her husband, and that the creditor seeking the benefit of this contract, and relying upon it, surrendered an existing security or advantage.

229 * It is not meant to intimate in any thing which has been said, that however the complainant might suffer by a reliance upon the conduct of those with whom he contracted, that the execution of this contract could be enforced against the rights of disposition contained in the deed of trust. That would constitute a paramount law, governing and controlling every contract in relation to it, and it need be scarcely necessary to say, that no decree could pass against her to carry into effect any contract she might make, unless such contract were within the limits of her *jus disponendi*.

This is a stronger case in favor of executing the contract, than was the case of *Price & Nesbit vs. Bigham's Ex'rs*. There the power was to pass the estate by deed. Here it is by deed or contract. Embracing by the latter term, the power to pass the estate by every kind of agreement known to the law, in which, estates of the description mentioned in the deed of trust, could pass.—As a *feme sole*, she had power to contract with any one, and to bind her estate, and to charge it with such contract. The power is sufficiently large and unrestrained to permit her to contract as security for others, and thus to pass her estate for the benefit of the principal, and to secure to his creditors their debts—she might voluntarily sell her lands, and with the proceeds pay her husband's debts. Why might she not upon a consideration incur it for the same purpose? There is nothing in the spirit and meaning of the deed of trust in opposition to such liberty; on the contrary, every thing to uphold and confirm it—while it is cautiously guarded against liability for her husband's debts, her will and power over it is unrestrained. And if she chooses to exercise a kindness to her husband in discharging his debts, and thus charging her lands upon a sufficient consideration, there is clearly nothing in the intention of the settlement which forbids it. She was never intended to be placed in a state of pupillage with regard

to her property, but left free to act as she pleased, with regard to it, as fully and as perfectly as if she had been a *feme sole*, and as if she had the legal title; nor are we bound in order, to give efficacy to her acts, to see that she has sought the counsel of * her friends, or solicited the permission of her trustee—such a limitation would restrict her will, in violation of the essence and spirit of the power. **230**

It is supposed that the allegations in the bill do not set up a proper foundation for the interposition of a Court of equity. The plaintiff's title to the assistance of the Court, must always be exposed by the pleadings; but the style and character of pleading in equity has always been of a more liberal cast than that of other Courts, as misleading in matter of form has never been held to prejudice a party, provided the case made is right in matter of substance, and supported by proper evidence. *Cooper Eq. Plead.* 7-8.

The allegations then contained in the original and two amended bills, are in substance these—That the property prayed to be sold as conveyed to trustees in trust for the separate use of the wife of Dudley Poor, setting out in substance the uses and trusts to which the property was subjected, it then avers the existence of a debt due from Poor to Tiernan, that Tiernan had surrendered his lien on the property of Poor, in consideration of the execution of a mortgage by Poor and wife on the lands of the wife thus conveyed in trust, which lands thus mortgaged, are prayed to be sold for the satisfaction of the debt. According to our views these averments make out a clear case for equitable interposition. In point of form it may not have been strictly correct to treat the instrument of writing in controversy as a legal mortgage, as it seems to have been done in the original bill. As such it may not be clothed with the necessary legal attributes. If it be not thus clothed, it is at all events, clearly a contract which equity will treat as a mortgage, and as between these parties, far as concerns this suit, liable to all the incidents of a strictly legal mortgage, as much so as if all the formalities of acknowledgment, privy examination, and registration, had been pursued.

Entertaining the views we do, we cannot but declare, that in substance, the allegations are correct and sufficient, and the equity clear and unquestionable. *The decree of the Chancellor is reversed.*

* KIERSTED *vs.* THE STATE, use of COSTELLO. **231**

MORROW *vs.* THE STATE, use of ISRAEL.

CHAMBERLAIN *vs.* THE STATE, use of KEILER.

December, 1829.

where an applicant for a discharge under the Acts relating to insolvent debtors, fails to appear according to the condition of the bond taken

from him, an action in the name of the State, (the obligee) for the use of a creditor, may be maintained thereon, against the applicant's security in the bond. The pleadings must disclose, that the equitable plaintiff was a creditor of the insolvent, to a certain amount; and the applicant's failure to appear. The amount of the creditor's debt, is the measure of damages; and neither the poverty of the applicant, nor the fact, that no allegations were filed against him by creditors; constitutes a defence thereto. (a)

Obligations in which many persons are interested, may be taken in the name of the State, whenever the law is silent in naming the obligees, to whom they are to be given. (b)

A consistent and uniform practice under various Acts of Assembly, passed in relation to the same subject, so fully establishes the contemporaneous construction of the first Act in the system, that after twenty years, it has too long obtained, to be shaken and disturbed. (c)

So bonds with condition for the appearance of insolvent debtors, made to the State as obligee, are sanctioned by the uniform practice of twenty years, although the Acts of Assembly, under which they are required to be executed, contain no specific provision for making them to the State, and creditors may bring suits on them, for their use, though not expressly authorized by law to sue. (d)

KIERSTED *vs.* THE STATE, *use of* COSTELLO.—Appeal from Baltimore County Court. The first of these appeals was an action of debt on a bond executed by N. Kimball, an applicant for the benefit of the insolvent laws, with the appellant (the defendant below) as his surety, brought at the instance and for the use of Costello, claiming to be a creditor of the insolvent. The defendant pleaded general performance by Kimball, to which the plaintiff replied, that Kimball was indebted to Costello in the sum of \$31.64, and that Kimball did not make his personal appearance before the Judges of Baltimore County Court, at, &c. on the first Saturday of September Term, 1821, then and there to answer such allegations and interrogatories, as his creditors, or any of them, might have filed against him, whereby the plaintiff sustained * damages to the amount of \$64, &c. The **232** defendant rejoined that Kimball was not indebted to Costello in the said sum of \$31.64, or any part thereof; and that no allegations or interrogatories were ever filed with the said Court, to be answered by Kimball on the first Saturday of September, 1821, or at any other time, by the creditors of Kimball or any of them. Issue joined.

(a) Cited in *State vs. Reaney*, 13 Md. 240. See the Act of 1880, c. 172, relating to insolvents.

(b) Approved in *Ing vs. State*, 8 Md. 295; *State vs. Norwood*, 12 Md. 192. See *McMechen vs. State*, 2 H. & J. 36; *McMechen vs. Baltimore*, 3 H. & J. 416; Rev. Code, Art. 65, sec. 51.

(c) Approved in *Baltimore vs. State*, 15 Md. 458.

(d) See note (b) *ante*.

At the trial, the plaintiff offered in evidence the bond upon which his action was brought, executed by Nathaniel Kimball and Luke Kiersted, (the defendant) to the State of Maryland, on the 31st of January, 1821, in the penal sum of \$600, and conditioned as follows, *iz.* “The condition of the above obligation is such, that if the above bound Nathaniel Kimball shall make his personal appearance before the Commissioners of Insolvent Debtors for the City and County of Baltimore, at the court-house, in the said City, on the second day of April next, at four o’clock in the afternoon, and answer such interrogatories as may be propounded to him by any of his creditors, agreeably to the Act of Assembly, entitled, an Act relating to Insolvent Debtors, in the City and County of Baltimore, and shall so make his personal appearance before the Judges of Baltimore County Court, at the court-house, in the City of Baltimore, on the first Saturday of September Term next, then and there to answer such allegations and interrogatories as the creditors of the said Nathaniel Kimball, or any of them, may have filed against him, agreeably to the said Act of Assembly, and the Act, entitled, an Act for the relief of sundry insolvent debtors, and the several supplements thereto, and continue in Court, until duly discharged, then the above obligation to be void, else to be and remain in full force and virtue of law.”

The plaintiff proved the execution of the said bond by the subscribing witness thereto, and then gave in evidence a warrant issued on the 15th of March, 1821, by a justice of the peace of Baltimore County, against the said Kimball, to answer unto the said Costello in plea of debt, &c. upon which said warrant was thereon endorsed, the following judgment which the plaintiff also offered in evidence.

“Judgment in favor of the plaintiff, for thirty-one dollars and sixty-four cents costs, with interest until paid or satisfied. March 20th, 1821.” **233**

“The above judgment is subject to the defendant’s application for the benefit of the insolvent laws, for City and County of Baltimore.”

The plaintiff also proved that Kimball did not make his personal appearance before the Judges of Baltimore County Court, on the first Saturday of September, 1821; but did appear before the Commissioners of Insolvent Debtors. The defendant then proved that such allegations or interrogatories were filed by either the said Costello, or by any of the creditors of said Kimball, either before the Commissioners of Insolvent Debtors or Baltimore County Court. The defendant then prayed the Court to instruct the jury, that the plaintiff was not entitled to recover. Which instruction the Court [HANN and WARD, A. J.] refused to give.

The defendant excepted. Verdict that Kimball did not well and duly observe, perform, &c. all and singular, the articles, &c. in the condition of the writing obligatory on his part to be performed, &c. and damages assessed to the sum of \$37.65. Judgment upon the

verdict against the defendant, for \$600 debt and costs, with a memorandum that the judgment was to be released on payment of the said sum of \$37.65, with interest from, &c. and costs. From this judgment the defendant appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

Mitchell, for the appellant, contended,—1. That Costello had no right to bring this suit. 2. That the refusal of the Court below to grant the defendant's prayer, was not authorized by law or the evidence in the bill of exceptions. 3. That the verdict was void in law. 4. That the judgment was erroneous in form and substance.

If the condition of the bond was violated, no individual creditor could bring suit on it; if he could, it must be a creditor * for
234 whose debt the insolvent was imprisoned. This bond was given to the State, and no authority is given for its being put in suit for the use of an individual. Suppose there is a judgment given in in this case, how are the other creditors to proceed? Can each of them bring a *scire facias* on this judgment; or must suits be brought on the bond for the use of each creditor? One judgment on the bond absorbs it. Where bonds are directed to be given to the State, a remedy is prescribed for suits being brought on them for the use of any individual who may be damnified—Such as on the bonds of sheriffs, executors, and administrators, &c. But there is no general law on the subject, as in Pennsylvania. 3 *Yeates*, 345; *Corporation of Washington vs. Young*, 10 *Wheat.* 406. By the Act of 1805, ch. 110, sec. 11, the bond is directed to be given as a security for those creditors only, by whom the insolvent is imprisoned. 1807, ch. 150, sec. 3; 1808, ch. 71, sec. 2; 1816, ch. 221, sec. 2; 1821, ch. 250. *Commonwealth vs. Hatch*, 5 *Mass. Rep.* 191. The creditor must show himself to be such, and to what amount he has been damnified. Here the verdict does not find the matter in issue—How much the party was damnified. The issue is taken upon the fact, whether the insolvent was indebted, and whether any interrogatories had been filed; and the verdict is, that the insolvent did not perform, &c. A verdict is void if it does not state what damages have been sustained by the party. 5 *Com. Dig. tit. Pleader*, 524; 7 *Bac. Ab. tit. Verdict*, (M.) 18, R. 37; *Hambleton vs. Veere*, 3 *Saund.* 171.

R. Johnson, for the appellee. The objection that Costello had no right to bring this action, comes too late, being after verdict. The assent to sue on the bond will be presumed to have been given. *Mc-Mechen vs. The Mayor, &c. of Baltimore*, 2 *H. & J.* 41; *In Corporation of Washington vs. Young*, 10 *Wheat.* 409, the corporation refused to give permission to have the bond put in suit. The condition of the bond in question is for the benefit of all the creditors of the insolvent. Ought it to be otherwise? As to the objection to the verdict, it is now too late to object to it. The issue was found by the

jury in favor of the plaintiff, but it is incorrectly stated by the clerk. So far as the issue is as to the not filing allegations, it was an immaterial issue; for the creditors were not bound to file allegations until the insolvent appeared. 1 *Chitty's Plead.* 634; *Tidd's Pr.* 813, 814. The verdict ascertains the debt. What ought to be the damages? They must be to the amount of the debt due to the creditor for whose use the action is brought. But it may be said that the bond was not forfeited, there being no allegations filed. The debtor must have appeared according to the condition of his bond, and in his plea in this suit he should have averred that fact. *Bac. Ab. tit. Obligation, (F.)* 174; *Archbishop of Canterbury vs. Tillis*, 1 *Salk.* 172. *Mitchell*, in reply.

MORROW vs. THE STATE, *use of ISRAEL*.—Appeal from Baltimore County Court. This second appeal was also an action of debt brought on a writing obligatory entered into, to the State, on the 11th of May, 1821, by Hugh Ireton with William Morrow, (the defendant below, now appellant,) as his surety, in the penalty of \$500 conditioned, "that if the said Hugh Ireton shall make his personal appearance before the Commissioners of Insolvent Debtors for the City and County of Baltimore, at the court-house in the said City, on the 2d of July then next, at four o'clock in the afternoon, and answer such interrogatories as may be propounded to him by any of his creditors, agreeably to the Act of Assembly, entitled 'An Act relating to Insolvent Debtors in the City and County of Baltimore.' and shall also * make his personal appearance before the Judges of Baltimore County Court, at, &c. on the first Saturday of September Term then next, then and there to answer such allegations and interrogatories as the creditors of the said Hugh Ireton, or any of them may have filed against him, agreeably to the said Act of Assembly, entitled, 'An Act for the relief of sundry insolvent debtors,' and the several supplements thereto, and continue in Court until duly discharged; then," &c. The defendant pleaded general performance, to which there was a replication, stating that the said Ireton, on the 4th of May, 1821, made application to the Commissioners of Insolvent Debtors for the City and County of Baltimore, for a discharge under the insolvent laws of this State; that the Commissioners then ordered that the said Ireton should be discharged, and they did then appoint and fix the 2d of July, 1821, for the appearance of Ireton before them, at, &c. to answer such interrogatories as should be propounded to him by any of his creditors; and also did then appoint and fix the first Saturday of September then next, of Baltimore County Court, then to answer such allegations and interrogatories, as the creditors of the said Ireton, or any of them might file against him, and to continue in Court until discharged. That Beale Israel, being one of the creditors of

Ireton, to a large amount, to wit, in the sum of \$500, did file with the Commissioners of Insolvent Debtors for the City and County of Baltimore, before the said second of July, 1821, to wit, on the first of July, 1821, certain interrogatories to be answered by the said Ireton. That the said Ireton never did appear before the said Commissioners on the second of July, as aforesaid, or on any other day; and also that the said Ireton never appeared before Baltimore County Court, but absented himself therefrom, to deceive and defraud his creditors. Of all which premises the defendant, afterwards, &c. had notice. And the said Beale Israel, at whose instance and for whose use this suit is instituted, was, by reason of the premises, prevented from suing and holding to bail the said Ireton, and hath never since been able to arrest the said Ireton, and hath by reason of the premises, wholly lost his claim as aforesaid, on the said Ireton; * and
237 this, &c. The defendant rejoined to the replication that the said Ireton did appear before the said Commissioners on the said 2d of July, 1821, and that he also appeared before Baltimore County Court, and did not absent himself therefrom to deceive and defraud his creditors. Issue joined.

1. At the trial the plaintiff gave in evidence the application of Hugh Ireton, for the benefit of the insolvent laws of this State, and all the papers connected therewith; and also the docket entries of the commissioners, in his case. The report of the commissioners of insolvent debtors, for the city and county of Baltimore, dated the 22d of September, 1821, stated the following proceedings had before them, viz. the petition of Hugh Ireton of the City of Baltimore, praying for the benefit of the insolvent laws, dated the 4th of May, 1821. A schedule of his property, real, personal and mixed, excluding the necessary wearing apparel and bedding of himself and his family, amounting (being household and kitchen furniture,) to \$40. A list stating that there were no debts due to him. A list of his creditors, and among others Beale Israel, \$41.66. The whole amount of his debts as stated, being \$224.03. All of which was sworn to by the petitioner. Proof of the necessary residence of Ireton in the State, and that he was in custody, &c. The commissioners then appointed and fixed the 2d of July then next, for the personal appearance of Ireton before them, at, &c. "to answer such interrogatories as may be propounded to him by any of his creditors;" and they also appointed and fixed the first Saturday in the next September Term of Baltimore County Court, for the final appearance of the said insolvent before the said Court, "to answer such allegations as may be made against him by his creditors, or any of them, and for the final hearing of his said application." The bond entered into to the State of Maryland, by Hugh Ireton and William Morrow, on the 4th of May, 1821, in the penalty of \$500, and conditioned for the personal appearance of Ireton before the commissioners, and before Baltimore County Court, on the respective days before mentioned. Also the

and entered into by Thomas Power with William Morrow, as his surety, to the State of Maryland, on the 4th of May, * 1821, in the penalty of \$500, reciting that the said Power had been appointed by the commissioners, provisional trustee to take possession, for the benefit of the creditors of Ireton, of all his property, &c. and conditioned that Power well and faithfully perform the said trust, &c. Also a deed of conveyance, dated the 4th of May, 1821, executed by Ireton to Power, the provisional trustee, conveying all his property, &c. The certificate of Power, the provisional trustee, that he had received from Ireton all his property, &c. Then follows the personal discharge of Ireton, granted to him by the commissioners. Certain interrogatories were then stated to have been propounded to Ireton on the part of Beale Israel, to which, answers were given by Ireton, and sworn to by him, on the 11th of July, 21. The commissioners then further reported to Baltimore County Court, "that having diligently inquired and examined into the nature and circumstances of the said application, it appears upon each examination, that the said Ireton hath not complied with the terms and conditions of the said insolvent laws," &c. Whereupon it was considered and adjudged by Baltimore County Court, on the 1st of September, 1821, that the said Ireton was not entitled to the benefit of the Acts of Assembly for the relief of insolvent debtors; and that, therefore, the prayer of the said petitioner ought not to be granted. The docket entries of the commissioners on Ireton's petition, given in evidence as before mentioned, show that "the petition was filed on the 4th of May, 1821"—"Thomas Power was appointed provisional trustee"—that "the petitioner was to appear before the commissioners, to answer interrogatories on the 2d July, 1821, and appear before Baltimore County Court on the first Saturday of September Term, 1821, for final discharge." His "personal discharge was filed," and "an order for publication delivered to the printer." On the "12th of May, 1821, interrogatories were filed—Answer filed." On the "2d of July, 1821, the petitioner appears—provisional trustee continued. 22d of September, 1821, no appearance—no benefit." The plaintiff then proved that the said Ireton, at the time of his application, was, and still is, indebted to the said Israel, in the sum of \$41.66. The defendant then prayed the Court to direct the jury upon the foregoing evidence, that the plaintiff was not entitled to recover. Which direction the Court [ARCHER, J., HANSON and WARD, A. J.] refused to give. The defendant excepted.

The defendant then offered evidence to prove that the said Ireton, before, and at the time of his application, as set forth in the foregoing bill of exceptions, was extremely poor, and had no other property than that conveyed to his trustee, under the deed of trust aforesaid. To the admission of which evidence the plaintiff objected. Which objection the Court sustained. The defendant excepted;

and the verdict being for \$51, and judgment thereon rendered, for the penalty of the bond, &c. he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and DORSEY, JJ.

Williams, (District Attorney of United States.) The points for the consideration of the Court are—1. Whether the appearance bond of the insolvent debtor has been legally given?

2. Whether the *cestui que use* can recover more than nominal damages, if he proves no damages? And he gave no evidence that he was damnified by the forfeiture of the bond.

3. The evidence offered by the defendant that *cestui que use* was not damnified, was rejected by the Court below.

4. The damages should have been nominal.

1. No bond to the State is valid, unless given pursuant to some Act of Assembly. *Owings vs. Norwood*, 2 H. & J. 108, (*note*.) The bond to be given by a trustee, under the Act of 1805, ch. 110, sec. 4, is expressly required to be given to the State. But the bond required by the eleventh section to be given by the insolvent debtor for his appearance, &c. is not required to be so given—it is not said to whom the bond is to be given. By the Act of November, 1788, ch. 17, sec. 5, the trustee of an insolvent debtor was required to give bond to the State. By the Act of 1791, ch. 73, sec. 3, the trustee to
240 give bond to such person as the Chancellor should direct; and the *Chancellor directed such bonds to be given to the Attorney-General. The same provision is contained in the Act of 1792, ch. 67, sec. 3. By the tenth section of that Act, an imprisoned debtor, if required by the Chancellor, was to give bond; but it is not said to whom such bond was to be given. The practice seems to have been that the Chancellor directed the bond to be given to the sheriff of the county in which the debtor resided. Similar provisions are contained in the Acts of 1793, ch. 68, sec. 3, 10; 1794, ch. 72, sec. 3, 10; 1795, ch. 82, sec. 3, 10; 1796, ch. 70, sec. 4, 11. By the Act of 1797, ch. 82, sec. 7, the bonds of the debtors are to be given to the trustees. The Act of 1797, ch. 97, sec. 4, 11, contains the same provisions as the Act of 1796, ch. 70, sec. 4, 11, &c. Similar provisions are also contained in the Acts of 1798, ch. 64, sec. 4, 11, and 1799, ch. 88, sec. 4, 11. By the Act of 1804, ch. 110, sec. 4, trustees were required to give bonds to the State. By the eleventh section of that Act, imprisoned debtors, if required by the County Court, &c. are to give bonds with security, for their appearance, &c. but it is not said to whom such bonds were to be given. The Act of 1805, ch. 110, sec. 4, 11, has the same provisions. The same expressions will be found in the Act of 1808, ch. 71, sec. 2. We come now to the Act of 1816, ch. 221, sec. 2, whereby the commissioners of insolvent debtors for the city and county of Baltimore, are required to take a bond for the petitioner's appearance, &c. "with security to be

by them approved." From all the preceding, it will be seen that there is no provision of law which authorizes the giving of a bond by petition for the benefit of the insolvent laws, to the State of Maryland. The bond of a trustee of an insolvent debtor is expressly provided to be for the use of the creditors of the insolvent, whereas the bond to be given by the debtor is not provided to be for such use. No suit can be maintained on a public bond, unless the law provides that persons damnified may bring suit on any such bond. This was the argument in *McMechen vs. The Mayor, &c. of Baltimore*, 3 H. & J. 534. See the Acts 1794, ch. 54, and 1798, ch. 101, sub-ch. 3, sec. 1, sub-ch. 12, sec. 5. And as analogous, he referred to 3 *Saund.* 2, 415 (*note*;) 1 *T. R.* 287; * *Kerr vs. The State*, 3 H. & J. 241; *Ellicott vs. The Levy Court, &c.* 1 H. & J. 359.

2. The bond being given that the insolvent debtor shall appear, cannot be for the benefit of the creditors, if he does not appear. In all events, the debtor failing to appear cannot subject the surety to the payment of all the debts due to creditors. In an action on a bond with a collateral condition to secure third parties, there ought to be some evidence of damage; or else, why should the plaintiff be permitted to sue? What interest has this creditor in this bond, his name not appearing in it,) except because he is damnified by the non-appearance of his debtor? He ought to have given some positive evidence of injury sustained by the forfeit of the bond. It would be a violent presumption, without evidence and against evidence, to presume that he is damnified to the whole amount of his debt. And not he only; but all the other creditors. So that the surety of an insolvent debtor is to be overwhelmed, because, to release his friend from imprisonment, he is his surety for his appearance. He may be, and no doubt, universally, sureties become so, because they know their principal is worth nothing or little, and, therefore they can be very slightly injured by the forfeiture of the appearance. There is nothing in the law analogous to this doctrine. For with regard to special bail, or rather sureties in a bail bond, the presumption is, that the debtor is able to pay the debt, from which he is released. But it is otherwise with respect to insolvent debtors.

3. But suppose the presumption not to be so in ordinary cases. In this case evidence was offered and rejected, to show actually that the principal had nothing, and, therefore, the creditor could have recovered nothing. All that could be done was to imprison him. This would be no satisfaction of the debt, but merely a penalty for non-payment. Under our insolvent laws, imprisonment is no satisfaction for debts. It is used to coerce debtors to give up their property, as a punishment for fraud. Here the proof is, that the debtor has given up all his property, of course, all that could be done would be to imprison him.

4. If there was such a privity between this creditor and the obligors in the bond, that being forfeited, he could sue on 242

it. Still if he was not actually damnified, he was only entitled to nominal damages. By the Act of 1821, ch. 250, provision is made for the enlargement of the time for the appearance of the debtor, without requiring a new bond, and without the consent of the creditors. What then becomes of the old bond? 5 *Johns.* 42; 9 *Johns.* 300; 10 *Johns.* 563; 2 *Johns.* 205.

Mercedith, for the appellee. This suit was brought in the name of the State, for the use of one of the creditors of an insolvent, against his surety, in a bond given for the appearance of the debtor, in pursuance of the Act of 1816, ch. 221, sec. 2.

In the argument on the part of the appellant, it was made a question whether there could be any recovery on the bond in this case, since there is no specific provision in any part of the law referred to for taking bonds of this description in the name of the State; and it is upon this question alone that the counsel for the appellee, will detain the Court. It is certainly true, that the Act in question does not designate the obligee in these bonds. After providing for the appointment of the provisional trustee, the section above cited, proceeds to direct, "that the commissioners shall take bond, with security, to be by them approved, for the appearance of such insolvent, to answer such interrogatories as may be propounded to him by any of his creditors, or such allegations as may be filed against him, within the time hereinafter mentioned." But, in the similar provision, which is to be found in the Acts of 1805, ch. 110, sec. 11; 1807, ch. 150, sec. 3; 1808, ch. 71, sec. 2; and 1817, ch. 183, sec. 1, there is no more particular designation of the obligee, than in the Act of 1816; and yet the invariable practice has been from the passage of the first general insolvent law in 1805, to the present period, to take the appearance bonds of insolvent debtors in the name of the State, and the legality of doing so, it is believed, has never before been questioned. A construction, therefore, thus given * by the
243 Courts throughout the State, and uniformly acted upon for upwards of twenty years, in the innumerable cases which have arisen under the insolvent law, should not be disturbed but for the strongest and most unanswerable reasons. Where the interpretation of a law is doubtful, the exposition given to it immediately after its passage, when the intention of the Legislature is more certainly ascertained than at a later period, is entitled to great consideration, and generally is deemed decisive. *Contemporanea expositio est fortissima in lege.* 6 *Bac. Ab.* 385. Again, it is a rule in the construction of statutes that such an interpretation ought to be given as will prevent the object of the law from being defeated. 15 *Johns.* 358. If the objection to the bond in this case is a valid one, it is manifest that the provision which the Legislature intended for the security of creditors is rendered wholly inoperative. For if the bond cannot be rightly taken in the name of the State, because it is not so specifically directed, it cannot for precisely the same reason be taken in

the name of any other obligee. And thus creditors are left without any security whatever, and the intention of the Legislature, which is obviously to substitute the appearance bond in the place of special bail, is completely frustrated. Legislative intention is often resorted to, to explain the meaning of laws, 15 *Johns.* 358. That intention may be collected from other provisions in the same law, and looking to the provision with regard to the trustee's bond, which is expressly directed to be taken in the name of the State by the Act of 1805, it would seem that the Legislature must have intended that the appearance bond should also be given to the State, or they would have otherwise directed. Why should the one be taken in the name of the State and not the other? They are both for the security of creditors; the State, is not interested, but selected merely as a safe and permanent trustee for their benefit. Having once mentioned the form of a bond, it was not thought necessary to repeat it. And it may be remarked, that in the Act of 1808, ch. 71, sec. 3, where both the trustee's bond, and the appearance bond are mentioned, there is no specific direction as to either, with regard to the obligee; and * yet it will scarcely be doubted, that a trustee's bond is under this law, which is the last upon the subject, properly **244** and legally given in the name of the State. If, however, the bond in this case is not considered as being authorized by the Act of 1816, in connexion with the preceding insolvent laws, the appellee insists that it is still a good bond at common law, and that the State ought to be regarded as a trustee for the creditors, for whose benefit it was intended. This principle will be found to have been repeatedly settled in England and this country. The Court, however, is particularly referred to 2 *Strange*, 1137; 12 *Mass. Rep.* 397; *Addison's (Penn.) Rep.* 72, 84. That creditors may sue upon bonds of this description, notwithstanding there is no particular provision to that effect in the law under which they are given, the Court is also referred to 4 *Dall. Rep.* 95; 5 *Mass. Rep.* 91, and *M'Mechen vs. The Mayor, &c. of Baltimore*, 3 *H. & J.* 534. See also 1 *Binney's Rep.* 370, as to the priority of those who first sue on official bonds, &c.

CHAMBERLAIN *vs.* THE STATE, *use of* KEILER.—This third case was an appeal from Frederick County Court, and also an action of debt on a writing obligatory entered into on the 24th of June, 1818, by the defendant, (now appellant,) with David Wagner and John Gilbert as his sureties, to the State in the penalty of \$1,000, and conditioned for the appearance of the defendant in Frederick County Court on the first Monday of November then next, to answer the allegations of his creditors according to the provisions of an Act of Assembly, entitled, "an Act for the relief of sundry insolvent debtors, passed at November Session, 1805, and the supplements thereto," and shall not depart the said Court without the leave thereof. The defendant pleaded.—1. That the action ought not to be maintained,

&c. because no creditor or creditors of the defendant at any time from the time of the making the said writing obligatory to the time of the commencement of this suit, made any allegation or allegations in Frederick County Court against the defendant, according to the provisions of the Act, entitled, &c. or the supplements thereto, or any of them; and this he is ready to verify, &c.. 2. That the
245 *action ought not to be maintained for the use of George Keiler, because the said Keiler did not at any time from the making of the writing obligatory aforesaid, to the commencement of this suit, make any allegation or allegations in Frederick County Court against the defendant, according to the provisions of the Act of Assembly, entitled, &c. or of the supplements thereto, or any of them; and this he is ready to verify, &c. 3. That the defendant did make his personal appearance in Frederick County Court on the first Monday of November next ensuing, the date of the said writing obligatory, to answer the allegations of his creditors, according to the provisions of the Act, &c. and did not depart the said Court without the leave thereof; and this he is ready to verify, &c. To the first and second pleas there were general demurrers. To the third plea, a replication that the defendant did not make his personal appearance, &c. And that George Keiler was a creditor of the creditor of the defendant to the amount of \$61.96. Issue tendered and joined. The County Court ruled good the demurrers to the first and second pleas. Verdict on the issue to the replication to the third plea for the plaintiff. Judgment on the verdict, and the defendant appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, ARCHER, and DORSEY, JJ. by

Taney, (Attorney-General of Maryland,) and *Ross*, for the appellant. The Act for the relief of insolvent debtors, 1805, ch. 110, and its several supplements, have for their object, the relief of insolvent debtors who comply with the provisions of those Acts. The bond required by those Acts (*vide* the Act of 1807, ch. 150, sec. 3,) manifestly shews that the condition of the bond was, to answer allegations if filed, but not to make the debtor and his securities answerable to creditors who had no allegations to make against the debtor. If the insolvent was a delinquent, and against whom the creditors thought they had a right to complain, and did complain in the form of allegations, then the condition of the bond was forfeited by the
246 non-attendance of * the insolvent debtor. As no allegations were filed in this case, it is proof that the insolvent debtor fully complied with the provisions of the insolvent laws; for it was not necessary, to enable the creditors to file allegations, that the insolvent debtor should be present. The condition of his bond was, to answer the allegations of his creditors, but if they have no allegations to make, or if they had, and made none, how can they derive

a right for the non-performance of a condition, the breach of which was attended with no loss to them, nor invaded any of their statutory rights? To enable the creditors to recover on the insolvent debtor's bond, they must show they filed allegations against the petitioning debtor, and that he did not personally appear to answer those allegations as the condition of his bond required him to do.

Pigman, for the appellee.

EARLE, J. delivered the opinion of the Court, in the three preceding cases.

We propose to give a condensed view of these cases, and to decide them together. For although their pleadings are a little variant from each other, they have all originated in the same * kind of cause of action, and the principal questions presented by them **247** on the argument are the same.

They are suits upon obligations given by insolvents to the State, conditioned to appear at certain times and places, to answer the interrogatories and allegations of their creditors, to be filed against them, which in each Court were decided adversely to the obligors.

The first and chief question, arising out of them is a consideration whether actions can be maintained on these obligations, inasmuch as they have been taken in the name of the State of Maryland, and no express authority is given by law so to take them.

The Act of 1805, ch. 110, is the first general insolvent law enacted in this State, to which there have been many supplements; and since then various insolvent Acts to suit the situation of the City and County of Baltimore, have been passed. All have been examined by the Court, as well as some in favor of individuals, before and since 1805. In none of those Acts is there any specific provision for taking these bonds of the insolvents in the name of the State, although by the Act of 1805, and several other Acts, the Courts, Judges and Commissioners, are to take of the imprisoned debtors, at the time of their discharge, bonds conditioned for their appearance to answer the allegations of their creditors, in penalties to be prescribed, and with security to be approved of by them. Notwithstanding the manner of taking these bonds, is no where specifically directed; we are assured, upon full enquiry, that they have been invariably passed to the State of Maryland, for more than twenty years past, whether taken by the Courts, the Judges, or the Commissioners of Insolvent Debtors for the City and County of Baltimore. What has produced this uniformity, it is not easy to say, unless it has been brought about by implicitly following the example of the Courts and Judges, upon whom it first devolved to execute these Acts of Assembly. As no person was designated, in whose name the bonds were to be given, it is probable the Courts and Judges were prompted to the course pursued by the consideration, that the law in this particular could

248 not be * executed, without an obligee was supplied by them, and by reflecting, that for permanency and convenience, none could be selected, more suitable than the State itself, to which all official bonds were given, and other kinds of bonds, where a multiplicity of persons are concerned. And it may be, that they were conducted to this resolution, by reasoning upon the supposed intention of the Legislature, that these bonds should be taken in the name of the State, from the fourth section of the Act of 1805, ch. 110, which directs the trustees of insolvents to give bond to the State. Whatever may have led to the practice, its consistency fully establishes the cotemporaneous construction of the first Act, in this system of laws, and we think it has too long obtained, to be at this time shaken and disturbed. And we further think, that to promote the execution of similar legislative provisions, it may be well received as a settled rule for the government of our Courts of justice, that obligations in which many persons are interested, be taken in the name of the State of Maryland, whenever the law is silent in naming the obligees to whom they are to be given.

Another question insisted on by the appellants in the argument of this cause is, whether the appellees could sue these bonds for their use, there being no provision in any of the insolvent Acts, to enable them thus to sue. This point we consider settled in this Court, by the cases of *McMechen vs. The Mayor and City Council of Baltimore, use of A. Storey*, and *McMechen vs. The Mayor and City Council of Baltimore, use of Hollingsworth & Williams*, 2 H. & J. 41, and 3 H. & J. 534. They were suits on an auctioneer's bond, taken under an ordinance of the city, which did not authorize any person, in particular, to sue it. They were nevertheless sustained, and the judgment of the County Court, therein affirmed by this Court.

A still further question was moved on the argument of this case, by the appellant's counsel. They contended, that if those obligations were liable to be sued by the appellees, nothing could be recovered by them but nominal damages. Upon this subject, we are of opinion, there is very little room for doubt. In directing these bonds to be taken, the Legislature must have * had in view the interest
249 of the creditors of the insolvents, and not merely to authorize them to sue, to run the insolvents and their securities, to useless costs. To give them additional security for their debts, by obliging the insolvents to enter into stipulations, in nature of bail bonds, was the object; and the amount of their individual demands, we should think, must be the measure of the damages to be recovered by them respectively. These cases were partly argued upon notes, which were not filed until the close of the last term, and could not have been earlier disposed of by us. They appear to have been properly decided in every respect, by the County Courts, and we affirm their judgments, concurring with them in the opinions expressed on the exceptions, in the two first, and on the demurrers in the last case.

Judgments affirmed.

GIRAUD'S Lessee *vs.* HUGHES *et al.*—December, 1829.

It is true as a general principle, that the lines of a tract of land originally run by course and distance, without calls, must be confined to the course and distance, and cannot be extended beyond them.

Where a tract of land lies adjacent or contiguous to a navigable river, or water, any increase of the soil, formed by the water gradually, or imperceptibly receding, or any gain by alluvion in the same manner, shall, as a compensation for what it may lose in other respects, belong to the proprietor of the adjacent or contiguous land. It is not upon the principle that the land calls for the water, but, because it adjoins the water, that the owner acquires a title to the soil so formed. (a)

In ejectment it appeared that the land for which the action was brought, and which had been recently patented as vacant land, had been formed by the gradual recess of the waters on the shores of the River Patapsco; and that another tract of land the lines of which ran into, though they did not call for the water, where the recession took place, had been patented many years before. The defendant claiming title under the grant of this last tract, *held*, that the action could not be sustained. (b)

The Port Wardens of Baltimore by the Act of 1783, ch. 24, were authorized to grant permissions to make wharves, but in order to vest a title in any such wharf, it is essential by the provisions of the Act of 1745, ch. 9, sec. 10, that the grantee should have completed it according to his permission. (c)

(a) Approved in *R. R. Co. vs. Chase*, 43 Md. 35, and *Chapman vs. Hoskins*, 2 Md. Ch. 491. Cf. *Brown vs. Kennedy*, 5 H. & J. 156. In *Fletcher vs. Thunder Bay Co.* S. C. Michigan, Oct. 1883, the case in the text is approved and it was held that when a lot is conveyed as designated on a city plat, with the water as a boundary, such conveyance carries with it the land under the water to the centre of the stream, and that any island between the shore and the centre is appurtenant to the shore and passes with it. Cf. *Baltimore vs. Warren*, 59 Md. 96.

(b) Approved in *Jones vs. Johnston*, 18 Howard, 157, where the Court said that in the case in the text "Gist's Inspection, a grant as early as 1782, was bounded by one of its lines on the waters of the Patapsco River, afterwards a basin of Baltimore; the lines however were given in the grant by courses and distances and did not call for the river. Hughes held under this grant by deed in 1782. Before 1812, the waters of the Patapsco had gradually receded, and formed a body of firm land, which had been surveyed and patented by the State to the plaintiff. The question was whether or not Hughes was entitled to this alluvial deposit as the adjoining owner to the river. It was not doubted by the counsel or Court but that, if the grant of Gist's Inspection had been bounded on the river, this boundary of the tract would have included the land made by the recession of the water; and the Court even held, that as the original location of the tract extended into the river, it entitled those claiming under it to the land, on the ground that the principle governing these alluvial accretions gave them to the adjoining owner. In other words, the description in the original grant gave, in legal effect, to the grantee, a water boundary; and if so, the boundary included the accretions."

(c) Approved in *Casey vs. Inloes*, 1 Gill, 498. Cited in *Williams vs. Baker*, 41 Md. 528. See also Rev. Code, Art. 45, sec. 4; *McMurray vs. Baltimore*. 54

250 * APPEAL from Baltimore County Court. Ejectment for a tract of land called Augustus' Discovery Resurveyed. The defendants (now appellees) took defence on warrant, and plots were returned. Not guilty was pleaded and issue joined. The plaintiff made claim and pretension for all that tract or parcel of land, called Augustus' Discovery Resurveyed, as located on the plots.

The defence was taken under the patent of a tract of land, called Gist's Inspection, and for certain land lying between the 9th and 10th lines of said tract, as originally surveyed, and the present shores of the River Patapsco, which land was covered by the plaintiff's claim. This action was originally instituted against Christopher Hughes, and upon his death, his heirs-at-law, the present appellees, were made defendants.

The plots returned and filed in this cause, showed that the 9th and 10th lines of Gist's Inspection, (being on the N. E. corner, and Eastern side of said tract) according to their original location, run into the water of the River Patapsco:—That the part of said tract conveyed by J. M. Porter to Christopher Hughes, was also adjacent to the water, and of, the Northern and Eastern parts of the whole tract:—That the part of C. Hughes' purchase which he conveyed to Leonard Harbaugh, was in fact bounded by the waters of the Patapsco on the N. and E. by Montgomery street on the south, and by Hughes' purchase from Porter on the West:—That a certain permission which the Port Wardens of Baltimore in the year 1786, granted to Leonard Harbaugh to make a wharf, commenced to the N. and W. of his purchase from Hughes (at the beginning of Hughes' purchase from Porter, and at the East side of Henry street) and extended from such beginning, first N. then E. (being to the North of one of the lines of the lot which C. Hughes then owned, and extending nearly parallel with and along its whole Northern front on the river) then South, and then West, until it reached the shores of the Patapsco at the S. E. corner of Harbaugh's lot, and the intersection North side of Montgomery street with the water:—that the said wharf, as far as actually constructed, did not include more of the shores of the Patapsco than were immediately

251 adjacent to the water lines * of Harbaugh's lot, purchased from Hughes; and was much less extensive than the permission from the Port Wardens, not extending either so far North or West as the lines of that permission purported to authorize:—That the tract of land called Augustus' Discovery Resurveyed, lay to the N. and E. of the 9th and 10th lines of Gist's Inspection, and clear of those lines and clear of that tract as originally run according to the courses and distances of the patent—that Augustus' Discovery

Md. 103; *Harrison vs. Sterett*, 4 H. & McH. 354; *Hazlehurst vs. Baltimore*. 37 Md. 214; *Yates vs. Milwaukee*, 10 Wallace, 497; *Weber vs. Harbor Com'rs*. 18 Wallace, 57.

Resurveyed, covered a considerable part of the space, included in the lines of the permission of the Port Wardens to Harbaugh—That the shores of the River Patapsco, when the action was brought, ran along those outlines of Augustus' Discovery Resurveyed, which are adjacent to the water—and that the shores of the said river had in fact been extended from West to East, the distance from the East outlines of Gist's Inspection, to the East outlines of Augustus' Discovery Resurveyed, since Gist's Inspection was originally surveyed.

1. At the trial the plaintiff gave in evidence a patent to himself for the tract claimed by him, dated in 1813, and proved its location on the plots, to be correct—and he also proved that Augustus' Discovery Resurveyed, according to its true location, ran clear of the original lines of Gist's Inspection, which was the elder tract. And that the tenth line of Gist's Inspection, mentioned and called for in the said patents, was correctly located on the said plots—that the beginning of a tract of land called Augustus' Discovery, was correctly located, and that the beginning of the tract of land called Augustus' Discovery Resurveyed, was also correctly located, and that the beginning of both of the said tracts is in the said tenth line of Gist's Inspection. And he also offered in evidence a patent for the tract of land called Gist's Inspection, bearing date on the 9th of July, 1732, which contained no call for the waters of the Patapsco—that it is correctly located—and that Montgomery street is correctly located upon the plots. The defendants then proved that one John Mercer Porter, on the 6th of June, 1782, was seized in fee simple of the said tract of land called Gist's Inspection, at which time he conveyed to Christopher Hughes part of the
* said land, the lines of which part on the north and east
sides, in fact, ran into the River Patapsco, and offered evidence that the same is truly located—and also gave evidence, that the said Hughes took possession under said deed of the land so conveyed to him. The plaintiff then read in evidence a lease from said Hughes to one Leonard Harbaugh, for part of the said Hughes, the defendant's purchase, from Porter, lying adjacent to the water on the northeast and eastern lines thereof, leaving the said Hughes, however, one line on the north side of his lot purchased from Porter, adjacent to the shores of the River Patapsco—And that the said Harbaugh, in the year 1786 or 1787, commenced the building of a wharf at the said lot, and continued working at the same till the year 1789, when he quit working there, and abandoned the property; and that said Hughes then took possession of the same, and by himself, his tenants, and the defendants his heirs-at-law, have held it ever since; and that the said Harbaugh had laid and extended the logs of said wharf as the same are located on the plots, and had the same filled up in the middle and north side thereof, and partly so on the east and south part of the same; that the logs of said wharf, so made, have by injuries and decay in several parts, fallen down, (the top

log entirely around,) and have not been repaired since; that part of the ground filled up within said logs, has been, and still is used and occupied as a distillery of turpentine, and that the waters flows all around over the logs of said wharf, and within the same from ten to twenty feet according to the state of the tides. The defendants then offered evidence by William Patterson and Samuel Smith, witnesses sworn and examined, that they were members of the Board of Wardens for the port of Baltimore-Town, in the years 1785 and 1786, and for some time after—that all the other members of the said board, at that time, as also their then clerk, are since dead. That the said board had, at that time, a common seal, which had been adopted, and was used by the said board, that it was the general custom and practice of the board, to direct and have their official acts or proceedings, when given out to individuals, regularly signed
253 and attested * under the seal aforesaid, that they have no knowledge what has become of the said seal, or whether it is in being at this time or not. And also offered evidence by John Purviance, Esq. that he was clerk to said Board of Wardens in the year 1795, and for some time previous; that the said Board, during the time of his being clerk, had and used a common seal to attest their official acts and proceedings, which he understood and believed to be the same which the Board first adopted. That when he resigned his clerkship, the said seal with the books and papers of the Board, were given over to his successor—And also proved by the same witness that one Samuel Vincent, who is now deceased, was the last clerk to the said Board, whose powers ceased in the year 1797, when the Act incorporating the Mayor and City Council of Baltimore, went into effect and operation. And also proved by the same witness, that Richard Moale, who was the first Register, and James Calhoun, who was the first Mayor, have both been dead several years. And also offered in evidence by Emanuel Kent, examined as a witness, that he is and has been, for about two years past, the Register of the City of Baltimore, and as such Register it belongs to him to have the care and keeping of the public books, papers and proceedings of or belonging to the Mayor and City Council of Baltimore, and also those of the former Boards of Commissioners of Baltimore-Town, the special Commissioners and Wardens of the port of Baltimore-Town, and the seals of the said Commissioners, if any are in being. That he has no knowledge of the seal used by said Board of Wardens—that he hath never seen it—that he hath enquired and examined for the said seal in his office, and it cannot be found there or any where else, that he knows of, and also proved by the said witness, that a book which he now produces, came into his care and keeping as Register, when appointed, from his predecessor in office, and is one of the public books of the Mayor and City Council of Baltimore, and is by him believed and considered to be what it purports to be, a book containing the proceedings of the former Board of Wardens of

the port of Baltimore-Town. And also proved by the said witnesses, Patterson, Smith and Purviance, that the said book is the **254** * original book that was kept by the said Board of Wardens, in which were made and contained minutes and entries of their acts and proceedings. And also proved by John Eager Howard, that the said Leonard Harbaugh removed from the State of Maryland to the City of Washington, in the year 1791, where he resided until his death, two years or more since, except about two years whilst he was in Frederick County, and for a short time in Baltimore, and returned to Washington. The defendants then offered to read in evidence the following entries made in the said book, to wit: "At a meeting of the Wardens of the Port of Baltimore, July 5th, 1785, present Samuel Smith, Richard Ridgely, John Sterett, William Patterson, Samuel Purviance, Chairman—the board received the application of Mr. Leonard Harbaugh for permission to extend a wharf on Luns' Point, according to the plan annexed to his petition, which was read and ordered to lie for further consideration." "At a meeting of the Board of Wardens for the Port of Baltimore, September 28, 1786, present Samuel Purviance, William Patterson, Samuel Smith, Thomas Russell, Thomas Eliot, Daniel Bowly, the board having taken into consideration the application of Leonard Harbaugh, for extending his wharf on Luns' Point, agree that he be permitted to extend the same to the following courses and lines laid down as limits, viz: Beginning at a stone set up at the present water's edge at the east side of Henry street, marked C. H. No. 45, running north two degrees, west eight perches, then north eighty-eight degrees, east twenty-eight perches, then south fifty-six degrees thirty minutes, east ten perches and one-quarter of a perch, thence south thirty-nine degrees forty minutes, east ten perches and one-quarter of a perch, thence south twenty-three degrees, east ten perches and one-quarter of a perch, thence south ten degrees fifteen minutes, east five perches and a half a perch, thence south eighty-eight degrees, west parallel with the second line until it intersects the shore on the north side of Montgomery street,—ordered that permission be granted accordingly."—As the best evidence now to be had of the matters set forth and contained in the said entries, and for the purpose with the other evidence of the better * enabling and authorizing the jury to presume and find that the permission as stated in said last **255** entry, had been in due form of law granted by the said board to said Harbaugh, to build a wharf as therein stated—And also proved that the lines of the permission in the said entry mentioned are truly located on the plots. The plaintiff objected to the admission of the said entries in the said books as evidence, and did also object to the admission of all the said parol evidence about the said seal, and did then and there assert before the Court, that the said evidence was not proper to go to the jury. But the said Court [HANSON and

WARD, A. J.] did then and there declare and deliver their opinion that the said evidence, on the part of the defendants, ought to be admitted, and did permit and suffer the same to go to the jury. The plaintiff excepted.

2. The plaintiff in addition to the matters contained in the first bill of exceptions, further offered in evidence, a verdict and judgment rendered between the same parties in this Court at the present term for a part of the hereinbefore mentioned tract or parcel of land called Gist's Inspection. The defendants then in addition to the matters before offered in evidence by them, proved that from fifty to fifty-five years ago, the shore of the basin of Baltimore, passed at common tides as located on the plots in this cause, in the most western position of said shore, from a small plank enclosure on the south side of Montgomery Street, standing at the east end of a brick distillery of the lessor of the plaintiff, and running thence northwardly near a pump now standing, and thence passing between two stones on the north side of Hughes Street, at the intersection or corner of that street and Leonard Street, which several objects were pointed out by the witnesses to the surveyor in making the survey in this cause. And they also proved by a certain (Gould) that he when a boy, had paddled about in a canoe on the shoal water of the said basin, at or near where said pump now stands. It was then admitted by the parties, "that the several water lines or shores located by either party in this cause, show and designate where the tide water of the Patapsco River or basin of Baltimore flowed at different periods of time, receding gradually eastwardly to where
256 * the same now are shown by the most eastward location thereof, on the plots, and that the lines of Gist's Inspection when the same was granted, including part of the sixth line thereof, from the end of said line, ran into the water of the Patapsco or basin of Baltimore Town, to the end of the tenth line thereof; and that the above lines are so located, except a small part of the south end of the tenth line." The defendants then prayed the Court to instruct the jury, that if they believed the matters so offered in evidence, the plaintiff was not entitled to recover. Which instruction the Court gave. The plaintiff excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, and STEPHEN, JJ.

Learned, for the appellant, contended, 1. That the appellant (the plaintiff below) derives his title to the land in dispute from the State of Maryland, in whom the title was at the time of the grant to his lessor. 2. That the patent for Gist's Inspection, under which the defendants claim to hold said land, contains a course and distance location only, and the land in dispute lies entirely without the lines of that tract. 3. That the defendants cannot extend their lines of the

tract of land called Gist's Inspection, so as to take in any alluvial formations, with the lines of said tract according to its course and distance location, as laid down upon the plots. The patent not having called for the water in a single point. 4. That the lines of the deed from Mercer Porter to Hughes, for a part of the tract of land called Gist's Inspection, cannot pass a title to any land lying without the lines of the whole tract, according to its course and distance location; but that the second line of Porter's deed to Hughes must terminate at the outlines of the original tract. 5. That land covered by navigable water belongs to the State, and is the subject of a grant; subject however to the common use of fishing and navigation, &c. * 6. That there is no alluvial formation appurtenant to the land in dispute in this cause, to which the defendants can **257** claim title as riparian proprietor, so as to enable them to follow the recession of the water of the basin. 7. That by the Act of Assembly the permit of the Port Wardens of Baltimore, to build a wharf, was contingent in its effects, and did not divest the State of its title to the land covered by the permit, but in the event of the completion and maintainance of a wharf, that should be a permanent and beneficial improvement. 8. That the wharf mentioned in the proceedings in this cause was never completed, and is not such a permanent and beneficial improvement, as by the Act of Assembly, will vest a title in fee in the land embraced in the Port Wardens' permit, in the maker of said wharf, and those who may claim under him. 9. That the defendants having caused the tract of land called Gist's Inspection to be located by metes and bounds, under a commission obtained by their ancestor for that purpose, are now estopped from extending the lines of said tract of land, so as to take in other land lying without the lines of said tract, at the time said commission was executed. 10. That the title to the land in dispute, out of the plaintiff, on which the defendants rely in their defence, is not such a title in the defendants or a stranger, as is sufficient to prevent the plaintiff from recovering.

The grant for Gist's Inspection, dated the 9th of July, 1732, has no calls in it, but all the lines are course and distance. When the survey was made the courses ran into the water, and the grant was for land covered by water. The points arising in the first bill of exceptions are waived for the present. On the second bill of exceptions the material questions arise. It has been decided by this Court that the title to lands covered by navigable water remains in the State. *Brown vs. Kennedy*, 5 H. & J. 195. Land so situated remains so until granted by the State. Has this land been granted by the State? We contend that it was not until it was granted to the lessor of the plaintiff. This tract lies without the lines of Gist's Inspection; * and Gist's Inspection must be located course **258** and distance; and so located, it does not interfere with the land granted to the lessor of the plaintiff. There is no call to the

river in the grant of Gist's Inspection. It cannot, therefore, bind on the river. Imperative calls are to be gratified, and course and distance disregarded. This is settled law. When the grant of a tract of land is by courses and distances only, the grantee cannot take alluvial formations. All such formations belong to the State, unless granted to another by the State. The Proprietary abolished calls in all grants, in order to prevent more land being included in any grant than the party paid for and contracted to purchase. The evidence in this case shows that there were no alluvial formations. Harbaugh had permission from the Port Wardens to make a wharf, which he commenced and worked some time on it, but finally abandoned it. The ancestor of the defendants then took possession, having before then leased the adjoining property to Harbaugh. By that lease he located the land; and where a location is made by a party, he is estopped from denying it. *Ridgely vs. Ogle*, 4 H. & McH. 123. Upon Harbaugh's abandonment, the land reverted to the State, and Hughes had no right to interfere with the wharf. He was a trespasser upon the property of the State. Act of Assembly, April, 1783, ch. 24, sec. 9. The Acts of Assembly vesting powers in the Port Wardens to grant permission to erect wharves, contemplated permanent and beneficial improvements. The wharf commenced by Harbaugh and abandoned, was not a permanent or beneficial improvement. It was suffered to go to ruin. His contract, therefore, was void on his abandonment. Until such contract is fully complied with, the land continues in the State.

R. Johnson, for the appellees. The questions which arise upon the title and proof, are, 1. Whether or not the defendants are entitled, under the doctrine of alluvion, to all land added to Gist's Inspection?

259 * 2. Whether or not such a title is shown, under the permission given to Harbaugh, to erect a wharf, in the greater part of the land in question, as will prevent the plaintiff from recovering?

1. There can be no extension of the lines of Gist's Inspection farther than they will go by the courses and distances expressed in the grant. But the question of alluvion depends upon that tract of land lying on the river. It seems that a considerable part of Gist's Inspection, at the time of the grant, was covered by water. The claim under that grant, in the absence of the doctrine of alluvion, is for all that part which was so covered by water at the time of grant, but which is now, by the recession of the water, become firm land. The right of a person to alluvion, having land bounding on the sea, has been considered to be a common right. There is no difference whether the tract of land called for the river or not, the right to alluvion is the same. The right is given upon the principle, that he might lose land by the washing of the shore by the river. 2 *Blk. Com.* 61, 66, 261, 262; 5 *Bac. Ab. tit. Prerogative (B)* 495. This doctrine is not made to depend upon the grant of the land calling for, and binding on the river; but upon the fact only of the land lying

adjoining the river. The point could never arise, if the land called for and to bind on the river,—for in such a case, wherever the river went, the land would go with it. But the right is given to the proprietor of the adjoining land, because his land does not, by its lines, call to bind on and with the water. It is, therefore, only necessary for the defendants to show, that their land did adjoin the river, at the time it was granted.

The doctrine of estoppel cannot operate in an action of ejectment as to the locations made of the same land in another action of ejectment, even if between the same parties. Here the plaintiff has not counterlocated the location made by the defendants of Gist's Inspection. The evidence is, that the water run in a particular manner, until it gradually receded to where it now runs from, O to B, to 5 to V, leaving land formed by accretion. This is admitted in the bill of exceptions, and does away the effect of Harbaugh's wharfing out a part of it. * If this gradual increase of the land was by the recession of the water, in conjunction with the acts of Har- **260** baugh, still the doctrine of alluvion will attach. *Adams vs. Frothingham*, 3 Mass. Rep. 352. For a part of the land at least, there has been a gradual accretion, independent of the acts of Harbaugh.

2. The defendants are entitled, under the permit to Harbaugh, to build a wharf. But it has been said that Hughes was a trespasser. Suppose he was, it was nothing to the plaintiff. It was only necessary for the defendants to show that the State had parted with its title to the land. The Port Wardens had no authority to give permission to Harbaugh, to wharf out in front of Hughes' land, so as to deprive him of his water right. The wharfage privilege was to be given to the owner of the land, in front of which the wharf was to be made. Act of 1745, ch. 9, sec. 10. The lease from Hughes to Harbaugh was only of a temporary interest. When is the improvement perfected so as to vest the property in the improver? There is nothing to show but that the wharf erected by Harbaugh, did answer all the purposes for which it was intended. It will not be said, that if the wharf had been completed, but is now in a ruinous state, it would divest the title out of the improver. There was an improvement made, even if the wharf was not completed. If the permission granted, was not complied with, it was the duty of the Port Wardens to have it destroyed, as a nuisance. Act of April, 1783, ch. 24. The presumption is, that the permit to build the wharf was complied with. When Hughes took possession after Harbaugh's abandonment, the right became his. He was not bound to complete the wharf. All Harbaugh's rights were vested in Hughes. After the Act of April, 1783, ch. 24, this kind of property and right were placed under the control of the Port Wardens, and the land office had no right to grant a warrant to affect any land so placed. All the right of the State, if it had any, was vested in the Port Wardens; and by the Act of 1796, ch. 68, is vested in the Corporation

of Baltimore. Could not Harbaugh transfer his right to another; and could he not abandon in favor of Hughes? It will be presumed that he had regularly abandoned in favor of Hughes.

261 * *Mitchell*, on the same side. When Gist's Inspection was surveyed and granted, as all the deeds offered in evidence recognize, the tract of land ran with the edge of the river. The common law doctrine of alluvion is the civil law of alluvion. *Harg. L. T.* 28; *Abbot of Ramsay's Case*, 3 *Dyer*, 326 b. The State never had the right of alluvion. It is an increment of rivers subsequent to possession being taken by the sovereign. It cannot be appropriated or granted to any person, being imperceptible. If it was perceptible it might be granted, but being imperceptible it accrues to the adjacent soil. If an island appears in the sea, the sovereign may take possession of it. *The King vs. Lord Yarborough*, 10 *Serg. & Lowb.* 19. At what time did the right of the State, if any, accrue to this alluvion? The right of the public to navigable rivers, is no longer than any such river is covered by water. When it is no longer a public river, but has become land, it belongs to the owner of the adjacent soil, whether his grant for his land called to bind on the river or not. This case is not similar to *Brown vs. Kennedy*. This is a case of dereliction, not a filling up. *Harg. L. T.* 28; *Abbot of Ramsay's Case*, 3 *Dyer*, 326; 2 *Blk. Com.* 261; 5 *Bac. Ab. tit. Prerogative* (B. 3,) 498; *The Batture Case*, 5 *Hall's L. J.* arguments of *Jefferson* and *Livingstone*, 26, 27, 60, 63, 42, 46, 146, 147, 148, 149, 160, &c.; *Smart vs. Dundee*, 8 *Bro. Parl. Cas.* 119; *Poth.* 19, 20; *Vattel*, B. 1. ch. 22, sec. 5, p. 121. The right to the adjoining water passes as an appurtenance in all grants of land. This gave a right to the holders of adjoining lands to build wharves in Baltimore, if it did not obstruct the navigation of the river. The Acts of 1745 and 1783 took away all the State's right and vested it in the port wardens; and they were the judges whether or not Harbaugh had complied with the permission granted to him to build a wharf. If Hughes was the riparian proprietor both before and after his lease to Harbaugh, the State had no right to divest him of such right. After Harbaugh abandoned, the rights of Hughes were reinstated, and he was clothed with all Harbaugh's rights, who could not acquire a fee simple right against Hughes. See 2 *Hall's L. J.* 434, and 4 *Hall's L. J.* 517.

The verdict in the former ejectment did not affect the question as to the land now in dispute. Here the defendants, and those under whom they claim, have had long and uninterrupted possession; and the presumption is that the water belonged to them. *Bealey vs Shaw*, 6 *East*, 213.

Learned, in reply, cited *Kilty's Land Hold. Ass.* 228, 229; *Vattel*, B. 1. ch. 22, p. 121; 2 *Blk. Com.* 261; *Brown vs. Kennedy*, 5 *H. & J.* 195.

263 * STEPHEN, J. delivered the opinion of the Court. This action was instituted in Baltimore County Court to recover a

parcel of land called Augustus' Discovery Resurveyed, which was patented to John James Giraud, as vacant land, and whether it was vacant or not at the time he caused it to be resurveyed, is the question now to be determined, and in order to ascertain this question it becomes necessary to decide what was the true location of Gist's Inspection, patented to Richard Gist, on the 9th of July, in the year 1732, that is, not how it was originally located, but what was its true position at the time of Augustus' Discovery, and the resurvey upon Augustus' Discovery were taken up. It is admitted that Gist's Inspection, when it was surveyed and patented, ran into the water or basin of Baltimore; since that time the water has gradually receded, and the land formed by the recession of the water, is the land upon which Giraud made his survey of Augustus' Discovery in the year 1812, and his resurvey in the year 1813. In the course of the trial, the parties made the following admission: "It is admitted that the several water lines or shores located by either party in this cause, shew and designate where the tide water of the Patapsco River or basin of Baltimore, flowed at different periods of time, receding gradually eastwardly, to where the same now are shewn by the most eastward location thereof, in blue shaded lines, and that the lines of Gist's Inspection, when the same was granted, including part of the sixth line thereof from the end of said line, ran into the water Patapsco or basin of Baltimore-Town, to the end of the tenth line thereof, and that the above lines are so located, except a small part of the south end of the tenth line." It has been contended that as the lines of Gist's Inspection were originally run, course and distance, when the survey of it was made, and had no call to the water, it must be confined to its course and distance, and cannot be extended * beyond them. This position is true as a general principle in exposition of grants; but the question is not here what **264** was the true original location of Gist's Inspection at the time it was surveyed, but whether under the circumstances of this case, the defendants are entitled to the adjacent land formed by the waters having gradually receded in an eastern direction. Christopher Hughes, the father of the defendants, held a part of Gist's Inspection, and the deed under which he claimed title to it, describes it as running into the water; that deed bears date the 6th of June, 1782. The principle seems to be well settled, that where a tract of land lies adjacent or contiguous to a navigable river or water, any increase of soil formed by the waters gradually or imperceptibly receding, or any gain by alluvion in the same manner, shall, as a compensation for what it may lose in other respects, belong to the proprietor of the adjacent or contiguous land. For this principle, see 2 *Blk. Com.* page 261, where he says, "as to land gained from the sea, either by alluvion by the washing up of sand or earth, so as in time, to make terra firma, or by dereliction, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if

this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining." It is then not upon the principle that the land calls for the water, but because it adjoins the water, that the owner acquires a title to the soil so formed, for, continues he, *de minimis non curat lex*; and besides these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss; here we have in plain and strong language the reason of the rule, which places the acquisition of the additional soil by the owner of the adjoining land, upon the ground that he might be a loser by the breaking in of the sea, or at an expense to keep it out. And to bring the case within the operation of the rule, it is only necessary that the land should be adjoining the water. To the same effect is the law laid down in the 5th vol. of *Bacon's Abridgment*, page 494, title *Prerogative*; the principle is

265 there stated to be, that *if the sea leaves any shore by a sudden falling off of the water, such derelict lands belong to the king, but if a man's lands lying to the sea are increased by insensible degrees, they belong to the soil adjoining. Here, too, it appears only to be necessary that the land should be adjoining to the sea, to entitle its owner to the derelict land formed by the recession of the water. It appears by the proof in the cause, that Harbaugh, who obtained from the port wardens in Baltimore a permission to make a wharf, never did complete it according to such permission, but after proceeding in the work for some time, totally abandoned it. This permission he obtained from the board of wardens who were authorized to grant it by the provisions of the Act of 1783, ch. 24, but in order to vest a title in such wharf, it appears to be necessary that he should have completed it. This appears to be essential by the provisions of the Act of 1745, ch. 9, sec. 10, by which it is enacted, that "all improvements, of what kind soever, either wharfs, houses or other buildings, that have or shall be made out of the water, or where it usually flows, shall (as an encouragement to such improvers,) be forever deemed the right, title, and inheritance of such improvers, their heirs and assigns, forever." Neither Hughes nor Harbaugh therefore, acquired any title to the work done by Harbaugh, in virtue of his permission, but it being expressly admitted by the parties, that the water gradually receded to where it now flows, it is upon the ground of such gradual recession, by which the derelict land was formed, that Hughes and those now representing him claim title to it. The counsel for the appellant having waived the points arising on the first bill of exception, it is not deemed necessary to give any opinion upon it.

Judgment affirmed.

* HOSKINS *vs.* RHODES.—December, 1829.

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G. a *feme sole*, contracted with the plaintiff to let him sow a field in grain, and he agreed to give her one-third of all the grain raised, as rent. The plaintiff went upon and sowed the field in rye. The defendant, who after the making the contract, intermarried with G. entered upon the field, refused the plaintiff permission to cut the crop, and afterwards cut it himself and carried it away. In an action of trover for the value of the rye, it was held that the contract between G. and the plaintiff, clearly constituted them landlady and tenant; and that the plaintiff was entitled to recover. (a)

The reservation of rent *eo nomine* necessarily constitutes a lease.

APPEAL from Frederick County Court. This was an action of trover, brought by the appellee the (the plaintiff below) to recover the value of two hundred bushels of rye. The general issue was pleaded.

At the trial the plaintiff offered in evidence the following lease from Violetta Gwinn to Samuel Wiles, viz:

“Articles of agreement made, concluded, and agreed upon this the 4th day of March, 1820, between Samuel Wiles, of Frederick County, in the State of Maryland of the one part, and Violetta Gwinn of the other part, of the said county and State as above mentioned, to wit: The said Samuel Wiles, for the consideration herein-after mentioned, hath agreed, and hereby covenants and agrees to build the following buildings, to wit: one dwelling house, one stable, one corn house and spring house, and to keep the fences in good repair. The said Violetta Gwinn, for the above consideration, rents to the said Wiles her part of a tract of land, formerly occupied by Joseph Gwinn, late of Frederick County, deceased, for which she insures him three years quiet and peaceable possession for the term of three years rent free the first year to commence on the first of April, 1820. For and to the true and faithful performance of the covenants and agreements, the said parties do hereby bind themselves to each other and their respective heirs, executors and administrators in the sum of \$600 dollars,” &c.

The plaintiff then proved that sometime in the year 1822, he called upon Violetta Gwinn, she being a *feme sole*, and * contracted with her to sow a field of ten acres of land, part of the farm 267 leased to Samuel Wiles, in grain, and to give to Violetta Gwinn one-third of all the grain raised upon said field as rent. That in pursuance of said contract the plaintiff went upon and sowed said field in rye.—That in the month of July, 1823, the defendant, who had after the contract aforesaid, intermarried with Violetta Gwinn,

(a) Cf. Rev. Code, Art. 67, VII, s. 10.

entered upon the said field and cut and carried away said crop. That the plaintiff had previously applied to the defendant, who had gone into the possession of the farm mentioned in the lease to Samuel Wiles, for permission to cut said crop, which the defendant, refused, stating that he would cut the crop himself. The plaintiff further offered in evidence, that at the time of the contract aforesaid, Violetta Gwinn agreed that the plaintiff should hold said farm for three years after the expiration of the lease to Samuel Wiles. The defendant then proved that in the spring of 1823, the plaintiff and defendant agreed that that part of the lease which was to run from the 4th of March, 1823, should be abandoned, and that the defendant never went into possession of any other part of said farm, except the ten acre field aforesaid. The plaintiff then proved by Samuel Wiles, party to said lease, that in the fall of 1822, said Wiles agreed to let to the plaintiff the ten acre field aforesaid, to be sowed in grain, one-third of which, raised upon said field, was to be delivered to the said Wiles in the shock. The plaintiff further proved by a witness, that he heard the defendant say that he would stand by his wife's contracts; and that the plaintiff might cut the grain growing upon the said ten acre field. The defendant then prayed the Court to instruct the jury that upon the evidence offered, the plaintiff was not entitled to recover. Which instruction the Court [T. BUCHANAN, A. J.] refused to give; but on the contrary thereof, gave their opinion to the jury that the plaintiff was entitled to recover. The defendant excepted; and the verdict and judgment being against him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, and ARCHER, JJ.

Nelson, for the appellant, cited 2 *Blk. Com.* 145; 1 *Thomas Coke Litt.* 633; *Hare vs. Celley*, *Cro. Eliz.* 143; *Heath vs. Hubbard*, 4 *East*, 110, 121; *Wilbraham vs. Snow*, 2 *Saund.* 47, f, g, (note 1;) *Buller's N. P.* 34; 1 *Chitty's Plead.* 66.

Thomas, for the appellee cited, *Buller's N. P.* 85, and the case there cited, *Welch vs. Hall*; *Weems vs. Stallings*, 2 *H. & J.* 365; *Doe vs. Prosser*, 1 *Cowper's Reports*, 218; *Barnadiston vs. Chapman & Smith*, *Bull, N. P.* 35.

270 * MARTIN, J. delivered the opinion of the Court. The contract between Miss Gwinn and Rhodes for the ten acre field, clearly constituted them landlady and tenant. He was to make a crop, and give her one-third of it for rent.

The case of *Hare* and others against *Celley*, reported in *Cro. Eliz.* 143, is very different from that presented by this record. In the reported case the contract was, that *Hare*, the owner of the soil, should find one-half of the seed, and the other half to be supplied by the three persons who were to manure and cultivate the land, and

the crop to be divided between them. The Court said this being for only one crop it was not a lease. In the case now to be decided, there is nothing for legal construction. The agreement is explicit, that one-third of the crop should be paid as rent, and the reservation of rent *'eo nomine*, necessarily constitutes a lease—Rhodes was a tenant of Miss Gwinn by express contract, and it is immaterial whether the rent was to be paid in money, or to depend on the amount of the profits of the land. 2 *Wheat's Selwyn*, 1017, note 2; *Bull. N. P.* 85. *Judgment affirmed with costs.*

HAGTHORP *et ux. et al.* vs. HOOK's Adm'rs *d. b. n.*—December, 1829.

In a cause which had been set down for hearing, the Chaucellor, after argument of counsel, proceeded to discuss many rules and principles of equity, and a great variety of facts, as applicable to the subject under consideration; and announced his intention at some future day to decree accordingly. To enable him to do so, he referred the cause to the auditor, to state an account in conformity to his views, from the proceedings, and proofs then in the cause, or from such other proofs, as might be adduced by the parties, which they were respectively authorized to introduce upon notice, before a given day. In this state of the cause, an appeal was taken; and upon a motion to dismiss it, *held*, that the order in question did not so settle, or materially affect, * all, or any of the rights, or interests in controversy, as to make it a decretal order, from which an appeal would lie;—that it was a mere preparative, to the decision of the cause, and not decretal; and that it was only from what the Chancellor had done, that is, adjudged, or decreed, and not from what he intends to do, that an appeal would lie. (a) 271

A. by deed, conveyed certain real and personal chattels to I. upon the proviso, that if I. his executors, &c. should absolutely omit, neglect and refuse to pay certain creditors of A. recited in the deed, their just demands, then the deed should be void. This property came to the hands of I. and after his death, passed to his administrators and the other defendants claiming under him, and them. Upon a bill filed by the administrator *de bonis non* of A. praying that the property may be accounted for, and together with the rents and profits delivered up, it appeared that some part of the chattels real was still in the hands of I's representatives, some claimed by those who had purchased with a reference to the original conveyance, and the residue by those who offered no proof of being purchasers for value without notice. The Chancellor

(a) Affirmed in *Danels vs. Taggart*, *post*, m. p. 321; *Hungerford vs. Bourne*, 3 G. & J. 142; *Roberts vs. Salisbury*, 3 G. & J. 434; *Smallwood vs. Hatton*, 4 Md. Ch. 100; *Wayman vs. Jones*, 4 Md. Ch. 511; *Ware vs. Richardson*, 3 Md. 555; *Philips vs. Pearson*, 27 Md. 258; *Wilhelm vs. Caylor*, 32 Md. 162; *Hill vs. Reifsnider*, 39 Md. 431; *Dillon vs. Ins. Co.* 44 Md. 395; *Meyer vs. Stewart*, 48 Md. 425; *Cornell vs. McCann*, 48 Md. 603. Distinguished in *Nally vs. Long*, 56 Md. 571. See *Snowden vs. Dorsey*, 6 H. & J. 94; Rev. Code, Art. 71, secs. 39-42.

decreed that the deed would be considered a mortgage, and nothing having occurred to destroy its redeemable quality—but one of A's creditors having been paid, directed the auditor to state an account, in which I's representatives must be charged with the value of the whole of the personal chattels, and interest thereon, from the date of the deed from A. to I.; and with the rents and profits of the real chattels from the same date, and until the time when they passed into the hands of the other defendants; who were responsible during the time they respectively had possession. And that I's representatives would be held liable for all rents, and profits, which the other defendants should fail, or be unable to pay, giving them credit for the debt paid. *Per* BLAND, Chan.

According to the law of England, an administrator *de bonis non*, cannot call the representatives of the previous deceased administrator of his intestate to account, for any property of the intestate that such predecessor may have converted or wasted; nor can he claim or recover any thing, but those goods, chattels and credits of his intestate which remain in specie, and are capable of being clearly and distinctly designated and distinguished as the property of the intestate. *Ib.*

In equity, an executor or administrator, is considered as a trustee of the creditors, legatees and next of kin of the deceased; is expected and required to preserve the property of the deceased apart from his own; and if he does so, the Court will do every thing that can be done to protect and assist him. *Ib. (b)*

The only remedy at present against an administrator or his representatives, for any waste or misapplication of the effects of the deceased, is by an action at law upon his administration bond, by any one interested. *Ib. (c)*

The authority conferred by letters of administration *de bonis non* by our law, is to administer all things described in the Act of Assembly as

(b) Cited in *Rockwell vs. Young*, 60 Md. 567.

(c) In *Seighman vs. Marshall*, 17 Md. 570, where, in an action against an administrator, a creditor of the intestate offered evidence for the purpose of charging the defendant with a *devastavit*, the Court said: "we think the evidence was admissible. If the issue is properly made by the pleadings, there can be no doubt but that, in a suit against an executor or administrator, by a creditor of the decedent, it is competent to charge the defendant with negligence or mal-administration of the estate, if it can be established by proof. The appellee has argued that this can be done only by an action on the testamentary bond, and referred to *Hagthorp vs. Hook* in support of his argument. The language referred to, when taken in connection with the context, will not bear the construction put on it by the appellee. The Chancellor was speaking of the rights of an administrator *de bonis non* under the Act of 1798. This is a proceeding by a creditor under the Act of 1802, ch. 101, claiming to recover from an administrator his just proportion of the assets of the deceased, for which the administrator is by law responsible. If in such a suit no inquiry could be raised of a *devastavit* by the administrator it would be difficult to perceive how the creditor could by a proceeding at law ever recover for a *devastavit*. For he cannot sue on the bond till after judgment recovered against the administrator and *nulla bona* returned or other apparent insolvency or insufficiency of the person or effects of the executor or administrator, &c., and when such suit is instituted, the plaintiff would be limited, in his right of recovery, to the amount ascertained, by the previous judgments, to be due him out of the assets."

assets, not * converted into money, and not distributed, delivered, or retained by the former executor or administrator, under the direction of the Orphans' Court; and such an administrator can only sue for those goods, chattels and credits, which his letters authorize him to administer. *Ib.* (d) 272

The legal title to the chattels real, and personal estate, of an intestate, vests in his administrator, who alone is considered as to them his legal representative; between the death, and the granting of letters, that title is suspended and vested in no one. *Ib.* (e)

In the construction of the Statute of Distributions, it has been held, that although the creditors of the deceased are the first and special objects of its regard; yet that the next of kin, among whom the surplus is to be distributed take an interest which vests in them, by operation of law immediately, in the nature of a present debt of an unascertained amount payable at a future day; and it is clear that they can only obtain possession of their distributive share, through and from the administrator. *Ib.*

When the general replication is put in, and the parties proceed to a hearing, all the allegations of the answers which are responsive to the bill, shall be taken for true, unless they are disproved by two witnesses, or by one witness with pregnant circumstances. *Ib.* (f)

Every allegation of the answer which is not directly responsive to the bill, but sets forth matter in avoidance, or in bar of the plaintiff's claim, is denied by the general replication, and must be fully proved or it will have no effect. *Ib.*

If a defendant submit to answer at all, he must answer fully, and particularly, not merely limiting his responses to the interrogatories of the bill; but respond to the whole and every substantial part of the plaintiff's case; he is not however bound to go further and to answer interrogatories asking a disclosure of matter, no way connected with, or material to the case. *Ib.* (g)

When the answer in the body of it, purports to be an answer to the whole bill, but the respondent declares, that he is entirely ignorant of the matters contained in the bill, and leaves the plaintiff to make out the best case he can, or uses language to that effect; and the plaintiff files the general replication, all the allegations of the bill are thus denied, and put in issue; and consequently all of them must be proved at the hearing. *Ib.*

The rule in relation to trusts by implication, or operation of law, is by no means so large, as to extend to every mere voluntary conveyance. *Ib.*

(d) Approved in *Stewart vs. Ins. Co.* 53 Md. 572. Cited in *Taylor vs. Benham*, 5 Howard, 261, and *Beall vs. New Mexico*, 16 Wallace, 540. In the latter case it was held that an administrator *d. b. n.* cannot sue the former administrator or his representatives for a *devastavit*, or for delinquencies, in office; nor can he maintain an action on the former administrator's bond for such cause. The former administrator or his representatives are liable directly to creditors or next of kin. The administrator *d. b. n.* has to do only with the goods of the intestate unadministered. If any such remain in the hands of the discharged administrator or his representatives in specie he may sue for them either directly or on the bond.

(e) Approved in *Rockwell vs. Young*, 60 Md. 568.

(f) See *Roberts vs. Salisbury*, 3 G. & J. 425.

(g) See *Warfield vs. Gambrill*, *post*, m. p. 510; *Hopkins vs. Stump*, 2 H. & J. 263, *note*; *Equity Rules*, Rule 23.

Where the nature of the transaction charged in the bill, is such a one as must have been altogether within the knowledge of the intestate, the administrator may answer as he is informed and verily believes, but the answer of an administrator must always be taken, as well with a reference to the reason given for his belief, as to the nature of the subject of which he speaks. *Ib.* (h)

A purchaser for a valuable consideration without notice will not be disturbed in equity. *Ib.*

A purchaser with a knowledge of the trust becomes himself the trustee, and stands in the place of the vendor, under whom he claims. *Ib.*

273 * A purchaser with notice, from another purchaser without notice, may protect himself by the want of notice in his vendor. *Ib.*

When a purchaser cannot make title, but by a deed which leads him to a knowledge of the fact; and more especially, when the deed by virtue of which he takes, recites or directly refers to the instrument, in which the trust is declared, or from which it arises, he shall be deemed cognizant of the fact, and a purchaser with notice. *Ib.*

Under the head of just allowances, it has long been the course of this Court, to allow a trustee or mortgagor in possession, for all necessary expenses incurred for the defence, relief, protection and repairs of the estate.

And when a mortgagor thinking himself absolutely entitled, had expended considerable sums in repairs and lasting improvements, he should be allowed the value of them. *Ib.* (i)

The estimate of the value of such lasting improvements, is to be taken as they are, at the time of accounting, or passing the final decree: and in charging rents and profits the estimate must not include those arising exclusively from such improvements. *Ib.*

THIS was an appeal from Chancery. The bill was filed by James Neale, administrator *de bonis non* of Anthony Hook, and claimed payment for certain personal, and an account of the rents and profits of certain leasehold property, which the said Anthony in his lifetime had conveyed in trust to John Hook, deceased, and which was alleged to be in the possession of the representatives of John Hook, viz: Edward Hagthorp and wife, and other defendants, purchasers from the said John or his representatives. The complainant claimed the property for the purpose of distributing it according to law, and charged the defendants with confederating to prevent that object. Answers were filed, testimony taken, and the cause set down for hearing. But as the merits of the case were not reviewed by the Appellate Court, the appeal having been dismissed as prematurely taken, on the motion of the appellees; it is deemed unnecessary to publish more than this brief notice of the proceedings, and to refer to the opinion of the Chancellor which follows for the material facts of the cause, and to which his opinion is applied.

(h) Approved in *Carpenter vs. Ins. Co.* 4 Howard, 218.

(i) Approved in *Jones vs. Jones*, 4 Gill, 102, and *McLaughlin vs. Barnum*. 31 Md. 455, as to improvements. See *Quynn vs. Staines*, 3 H. & McH. 86. Approved in *Green vs. Putney*, 1 Md. Ch. 267, as to allowances to trustees.

BLAND, C. December Term, 1826. This case standing ready for hearing, and the counsel on both sides having been fully heard, the proceedings were read and considered.

* This suit is brought by James Neale, alone, as administrator *de bonis non* of the late Anthony Hook; and from the pleadings **274** and proofs, it appears, that the intestate, Anthony Hook, died in June, 1798: that in the month following, administration on his goods, chattels and credits, was granted to his son, John Hook, who died in September, 1800: that in the month of November following, administration *de bonis non* of the personal estate of the late Anthony, was committed to his widow, Mary Hook; who died sometime after the year 1804; and, that on the 5th of April, 1820, administration *de bonis non* of all the goods, chattels and credits of the late Anthony, was granted to James Neale; who, as such, on the 15th of December following, instituted this suit.

According to the law of England, an administrator, *de bonis non*, cannot call the representatives of the previous deceased administrator of his intestate to account, for any property of the intestate, that such predecessor may have converted or wasted; nor can he claim or recover any thing but those goods, chattels, and credits of his intestate, which remain in specie, and are capable of being clearly and distinctly designated and distinguished as the property of his intestate. 3 *Bac. Abr.* 19, 20. Hence, it is, that, in a Court of equity particularly, an executor or administrator, who is there considered as a trustee for the creditors, legatees, and next of kin of the deceased, is expected and required to preserve the property of the deceased apart from his own, and by itself to give it, as is said, an ear mark, that it may be always known and readily traced to any one, into whose hands it may happen to fall; and if he does so the Court will do everything that can be done to protect and assist him. 3 *Mer.* 42; *Salk.* 306.

According to our provincial testamentary system, an administrator *de bonis non* might, under certain circumstances, have had his predecessor cited before the commissary and compelled to account. 1715, ch. 39, sec. 3. *Dep. Com. Guide*, 55, 57. But at present, the only remedy against an administrator or his representatives, for any waste, or misapplication of the effects of the deceased, is, by an action at law upon his administration * bond by any one interested. For, it is expressly declared by our present law, **275** that the authority conferred, by letters of administration *de bonis non*, shall be to administer all things described in the Act as assets, not converted into money, and not distributed or delivered, or retained by the former executor or administrator, under the direction of the Orphans' Court. 1798, No. 101, ch. 14, sec. 2.

Hence, it follows, that this plaintiff is incompetent to demand, in the representative character, in which he sues, any thing, but those goods, chattels and credits, which his letters authorize him to adminis-

ter; that is, the chattels real and personal property of his intestate, which remain undisposed of by either of the previous administrators, John or Mary; or which have been and continue to be held unaccounted for by any one, as trustee or agent of the late Anthony Hook, his intestate. The statements and allegations of these very obscure original and amended bills, must, therefore, be taken subject to the limited rights of the representative character of this plaintiff.

It appears, from the pleadings, in this cause, that some of the next of kin, and distributees of the late Anthony Hook, under an impression, that the chattels real of the deceased, had vested absolutely in them, have disposed of, or attempted to make a final disposition of the whole, as if such chattels had been immediately cast into their hands by the mere operation of law; in like manner as the real estate of an intestate, is at once cast upon his heirs. If these next of kin acquired, at once, by the act of the law alone, a legal right to these chattels real, by virtue of which they might, either concurrently or independently of the administrator, dispose of them, then, as the joint or independent holders of the property in controversy, they ought to be made parties to this bill; and if they have acquired such a legal right, and have actually disposed of these chattels, then, it is no less evident, that all claim against these defendants is, so far, entirely at an end. In these points of view the allegations of the bill, in relation to these next of kin, of the intestate, present some important preliminary enquiries.

276 *The real estate of an intestate, devolves at once and entirely, upon his heirs, by the mere act of the law itself. But his personal property is, by the law itself, cast upon no one; nor does the legal ownership of it vest, immediately, in any person. Because, such legal title can only vest in an administrator; who alone, is considered as the legal representative of the intestate, as to his chattels real, and personal estate. In the interval of time, between the death of the intestate, and the granting of administration, the legal right to such personal property is in suspense, or in the keeping of the law, and vested in no one. During that interval, there is no person who can sue or be sued for it; and, hence, it has been held, that a person who had, after the death of the intestate, obtained possession of his personal property, could not have it quieted or matured into a right, by the lapse of any length of time, even as much as forty years uninterrupted possession, before the granting of letters of administration; because, the Statute of Limitations could not be allowed to operate at all, until the legal title was vested in some one; and there was a person lawfully clothed, with a capacity to sue for, hold and dispose of such property. 4 *Bac. Abr.* 479; *Salk.* 421.

Our Statute of Distributions, like that of England, 3 *Bac. Abr.* 72, directs the goods, chattels and credits of those, who die intestate, to be committed to an administrator, whose powers and duties are prescribed. He has a vested interest in the personal estate of the de-

ceased, 1 *P. Will.* 43: and is directed to collect and take the whole of it into his possession, which, or the proceeds of the sale thereof, he is, in the first place, to apply to the satisfaction of all the debts due from the intestate, and then, but not until then, he is to distribute the surplus among the next of kin of the deceased. In the construction of this statute, it has been held, that although the creditors of the deceased are the first and special objects of its regard; yet, that the next of kin, among whom the surplus is to be distributed, take an interest which vests in them, by operation of law immediately. It is considered as a species of *chose in action* of an indefinite value: in nature of a present debt, of an unascertained * amount payable at a future day. 3 *Mod.* 59; 1 *Show.* 2, 25; 2 *Show.* 407; *Pre. Cha.* 21; 1 *P. Will.* 380; 4 *Ves.* 665. This **277** interest vests in those who are the next of kin of the deceased at the time of his death: not, however, in exclusion of a posthumous child, who is regarded as a then living though unborn distributee, and therefore, should any of them die before the distribution of the surplus is actually made, his share will not be sunk into the estate of the intestate: but go to his own legal representatives in like manner as his other personal property. *Dep. Com. G.* 114; 2 *P. Will.* 446.

Hence, it is clear, that in no case, nor under any circumstances, can any one as next of kin of the intestate, rightfully and legally make title to, or obtain possession of his distributive share, but through and from the administrator: who, in equity, is regarded as a trustee for creditors and the next of kin; and as such may, in Chancery, be called to account by all or any of them. 1 *H. & J.* 151; 5 *Ves.* 743. And every one who takes possession of personal property of an intestate, after his decease, may be sued at law by a creditor as an executor *de son tort*, and charged accordingly; and in equity, he will be considered as a trustee, and held accountable to the administrator, no matter how long he may have had possession, before the administration was granted. 2 *Rand. Rep.* 397; 2 *Desau.* 232. The utility and necessity of having all the personal estate of a deceased, placed in the hands of an administrator, and the principle of law that neither a creditor, nor a distributee of an intestate could obtain any right to the personal estate of the deceased in any other manner, than from an administrator, has been very strongly recognized by the Legislature more than a century past.

By the Act of 1719, ch. 14, sec. 7, it is declared, that many widows, or others having the deceased's effects in their hands, and right to the administration thereof, designedly suffer other persons to administer, whose mouths are easily stopped, with part of the estates being delivered to them, and bring only such part of the appraisement to the great dishonor of the deceased, and deceit of the living; for prevention whereof, as well as of * frequent tedious suits, for the detecting such concealments, it is enacted, that the Court **278** may, in a summary way, cite such persons before it, and examine,

and decide on the matter. Here the distributees, the widow and others, having a right to the administration, who are the next of kin are specially designated, and it is expressly declared, that they shall not retain, or hold any of the personal estate of the deceased: and if they do conceal any of it, they are made liable in a summary way as wrong-doers.

If the law were otherwise; and if each creditor, and every one next of kin, were allowed to help himself, to what he thought his due; to seize upon, and, in any manner by his own act alone, acquire a legal right to the personal property of the intestate; the greatest confusion would ensue, and the most monstrous frauds might be perpetrated; no letters of administration would be taken out, in any case; but on the death of every one who had left any personal estate worth contending for, a disorderly scramble would take place; and those residents at a distance, infants, and all others who were unable to take care of their own interests, would be openly and wantonly defrauded, as this venerable Act declares, "to the great dishonor of the dead and deceit of the living." Such a course could not be tolerated in any shape or for an instant.

Hence, the indispensable necessity in all cases of a regular administration, and of compelling all, as well creditors, as next of kin, to resort for the payment of their claims and distributive portions, to an administrator. In this case, it is not pretended, that these next of kin of Anthony Hook, obtained anything, any right whatever from his administrators; consequently, having derived no right from either of the administrators; and none having been cast upon them by mere operation of law; they never had the power, in any manner, legally to dispose of any of the personal estate of the deceased; or to do any act which could at all affect the rights of the present plaintiff.

Leave was asked and obtained on the 7th of February, 1823, to make James Hook, the son of the late John Hook, a defendant; who on the same day, filed his answer to the * amended bill; and **279** in a kind of amended or duplicate bill, filed on the 23d of July, 1824, James Hook, is once incidentally spoken of as a defendant; no process was ever prayed against him; but by an agreement, filed on the 4th of November, 1826, he is admitted to be a party defendant. This person is no otherwise noticed in the proceedings; no charge, whatever, has been made against him; nor does it appear that he can, in any degree, be made liable for any part of the subject in controversy; either in his individual capacity, or as heir, or next of kin of his father, the late John Hook, or of his grandfather the late Anthony Hook. The presence of this defendant, James Hook, it appears to be in no way necessary; and, therefore, I shall, for the present, take no further notice of him.

The bills, through a considerable portion of them, seem to consider the next of kin and distributees; or, as it calls them, in relation to

these chattels, the heirs of the late Anthony Hook, to be in some way or other parties to this suit; but they have neither been made plaintiffs, nor defendants as such; and therefore, all that has been said, or proved about them, and their agreements, must be rejected as mere surplusage, and entirely foreign to the matter now under consideration. William McMechen, a defendant, says, he answers "the bill of complaint of James Neale and others, representatives of Anthony Hook, deceased:" and in the body of his answer, he says, "during all which time several of the complainants resided in the neighborhood of the said land;" others of the answers seem to have an eye to some other complainants, besides Neale. These respondents appear, in this respect, to have turned their attention to some of the irrelevant circumstances related in the bill, without sufficiently regarding its substance. But all such expressions and allusions, in the answers, must, in like manner, be rejected as surplusage.

So much as to the excrescences, the foreign matter, and mere careless verbiage of the bill, and some of the answers. But, before we can proceed to consider the merits of the case, it will be necessary to ascertain from these pleadings, as accurately as practicable, what is the matter as to which the parties * are at issue; and what part of the allegations of each had been admitted, taken for **280** true, or is to be sustained or combatted by proof. In relation to these matters it will be necessary to explain, recollect, and apply some of the general rules in relation to answers.

The first of these general rules, which have a bearing upon this case is, that where the general replication is put in, and the parties proceed to a hearing, all the allegations of the answers, which are responsive to the bill, shall be taken for true; unless they are disproved by two witnesses, or by one witness, with pregnant circumstances. The answer to this extent is considered as evidence, and conclusive, unless disproved; even although the defendant may have a direct and palpable interest in establishing the truth of what he advances. 3 *Wheat.* 527. An answer is only so far responsive as it answers to a material statement, or charge in the bill, as to which, a disclosure is sought; and which is the subject of parol proof; but no further. Where a deed, or instrument of writing is necessary to establish any right, and the bill enquires for the evidence of such right, the answer, unaccompanied and unsupported by such deed or writing, will be no evidence, although it should directly respond to the bill; because the answer is only in the nature of parol evidence; and in such case, evidence of a higher grade is required by law. 5 *H. & J.* 381.

But where the bill asks for the production of evidence, which from the nature of the plaintiff's case, he has a right to claim, that may be necessary and useful to him in other cases beside the one then under consideration; an answer to such a bill is not responsive, which

merely asserts the facts without saying any thing of the evidence of its existence, or the means of obtaining it. And, where a defendant, by his answer, asserts a right affirmatively in opposition to the plaintiff's demand, he must establish it by proof; or the assertion will be disregarded; for, a defendant cannot be permitted to swear himself into a title to the plaintiff's estate. 1 *Wash.* 225; 1 *Mun.* 395; 2 *John. Ch. Rep.* 87; 2 *Ev. Poth.* 157. But where an administrator is

281 called upon to answer certain matters, which appear to * have rested exclusively within the knowledge of his intestate, it will be sufficient that he swears as he is informed and believes; *Carnan's Ex'rs vs. Vansant's Administrators*, 1807, *MS.*, but such an answer is to be taken with reference to the reasons given for his belief; for, if the reasons are futile, and especially if the alleged belief be in a high degree irreconcilable with the admitted, or established circumstances of the case, the answer cannot be credited: nor be allowed thus loosely to swear away the equity of the bill. *Tong vs. Oliver and others*, 1809, *MS.*; 9 *Can.* 160.

A second general rule is, that every allegation of the answer, which is not directly responsive to the bill, but sets forth matter in avoidance; or in bar of the plaintiff's claim, is denied by the general replication, and must be fully proved, or it will have no effect.

A third general rule is, that, if the defendant submits to answer at all, he must answer fully, and particularly: not merely limiting his responses to the interrogatories of the bill; but respond to the whole and every substantial part of the plaintiff's case. 1 *John. C. Rep.* 75, 107. He is not however, bound to go further, and to answer any interrogatory asking a disclosure of matter no way connected with, or material to the case. If the answer be in any respect evasive, or insufficient, the plaintiff may except to it; and thus extract from his opponent a full and perfect answer. But to this general rule there is a modification, the nature and bearing of which may be sufficiently illustrated by one or two instances: a defendant to a bill of discovery, answered a portion of it, and as to all the other matters therein set forth, he answered and said, that he had no other knowledge of them, than what he had obtained confidentially as counsel; and therefore declined answering further: this answer was deemed sufficient; and again a defendant answered as to part, and as to the residue relied upon the Statute of Limitations: this answer was also held to be sufficient. In such cases, a part of the answer performs the office of a plea; and the defendant thus makes defence to the whole case, by a disclosure of all the facts so far as he is bound so

282 to respond; and for the residue, by presenting such an * equitable bar to the plaintiff's claim, as is a sufficient excuse for not answering in the manner required by the bill. The exact compass of this modification of the rule, that if a defendant submits to answer at all, he must answer fully, remains yet to be adjusted. 2 *Mad. Ch.* 339. Much has been said upon the subject; but as the

cases in relation to this “distracted point,” as it has been called, have no bearing upon the case now under consideration, they have been thus generally noticed merely to prevent misapprehension.

A fourth general rule, is one which grows out of the third rule, that exacts a full answer: and requires to be attentively considered in this case: it is, that where the defendant fails to answer any of the material allegations of the bill, such unanswered allegations shall, at the hearing, be taken to be true. (a) Thus where the bill demands the delivery of two pieces of property, and the answer makes defence as to one, but is totally silent as to the other. In such case according to this rule, the bill may be taken *pro confesso* for that, as to which the answer is silent; and the plaintiff may obtain a decree accordingly. The propriety of this rule has, however, been questioned; and therefore it stands in need of all the support it can derive from authority, reason, and analogy.

If, upon exceptions, the answer is held to be insufficient, the defendant will be ordered to answer more fully: and if he fails to do so, in England, sequestration will go against his estate. The plaintiff need not, however, stop there, but may proceed to have his whole bill taken *pro confesso*; for the Court is in the habit of considering an insufficient answer as no answer. 2 *Atk.* 21; 3 *Ves.* 209; 1 *V. & B.* 367; 2 *Ves. & B.* 258. In this State, obedience to the order directing a more perfect answer, upon exceptions being sustained, is usually enforced by attachment; but, as in England, on the defendant's failing to answer as ordered; and the process of attachment failing to coerce an answer, as required, the whole bill may be taken *pro confesso*; 3 *Ves.* 372, 209; so, where the defendant had answered, and the * plaintiff then amended his bill, introducing new matter, he is entitled to an answer to such **283** new matter; because, an amended bill is a part of the original bill, and the defendant's answer thereto is a part of his original answer; and consequently, the defendant is as much bound to answer the amended bill, as to answer each portion of the original bill itself. Therefore, if he fails to do so, the plaintiff may proceed, according to the course of the Court, and have his whole bill taken *pro confesso*. 4 *Ves.* 619; 3 *John. C. Rep.* 410. For, as it has been said, if the plaintiff should not be entitled to such a decree under those circumstances, then the authority of this Court would be very defective and the justice of it might be eluded. 2 *Eq. Ca. Ab.* 179; 1 *Har. Pr. Ch.* 277; 2 *Atk.* 21.

A plea is a special answer to a bill, differing in this from an answer in common form, as it demands the judgment of the Court, in the first instance, whether the special matter urged by it, does not debar the plaintiff from his title to that answer, which the bill

(a) The fourth general rule above stated has been denied by the Appellate Court in the late case of *Warfield vs. Cambrill*.—(G. & J.)

requires; but where, from the matter set forth in the bill, an answer is required to support a plea, it will be overruled without such an answer, upon the ground, that the matters not thus answered are taken for true. As where the bill sets out a claim arising on a mortgage made more than twenty years before the institution of the suit, and then goes on to shew, that there have been such partial payments, or recent acknowledgments, as would take the case out of the Statute of Limitations, were it pleaded. In such case, a plea of the Statute of Limitations must be supported by an answer, denying such partial payments and recent acknowledgments; for, otherwise, those circumstances, not being denied by the plea, would be taken for true, if not denied by way of answer; and would show that the case had been taken out of the statute. 2 Scho. & Lef. 725.

These authorities appear satisfactorily to sustain this rule; and to shew, that the defendant cannot be allowed, with impunity or advantage to himself, to refuse to answer at all; or, in any manner or form, to stop short, or to omit to answer any * material part
284 of the plaintiff's case; and, that the consequence of such a refusal or failure is, that the whole bill, or so much of it as remains unanswered, may, at the hearing, be taken *pro confesso*.

The proceedings in Chancery have been formed according to the course of the civil law, in some respects; and analogous to the common law in others; and, as to all matters of substance, there must be the same strictness in pleading in equity, as in law. Mit. Pr. 232. Hence, it is not unfrequent, where a case arises, as to which former decisions furnish no safe guide, to have recourse to the illustrative analogies of the common law. 2 Atk. 21; 3 Atk. 589; 6 Ves. 594; 9 Ves. 55; 11 Ves. 292. Supposing, then, that in relation to this subject, there was a total absence of all manner of precedent and authority, the analogous course of the common law will be found to afford much and strong light.

At common law, there are two defaults; the one before, and the other after appearance. The consequence of the first, in England, is, that the defendant may be outlawed; and in this State, in many cases, is, that an attachment may go against his estate. The consequence of the second default, or the defendant not putting in any plea at all, is, that the plaintiff may have a judgment by *nil dicit*. The plea is called, at common law, the answer of the defendant; and, if he fails to answer, judgment is awarded against him, on the ground that he has thus tacitly admitted, or confessed the case of the plaintiff, and left him nothing to litigate or to prove. So, in equity, after an appearance, the taking a bill *pro confesso*, where no answer has been put in, or no sufficient answer, after exceptions have been sustained, is analogous to the taking the declaration for true, where the defendant has put in no plea at all, or it has been held insufficient on demurrer. 2 Atk. 21.

It is a rule at common law, that every plea must answer the whole declaration, or at least every material part of it, which goes to constitute the gist of the action. But, the defendant may fail, or purposely decline to plead, or answer to every part of the declaration; in which case the plaintiff may join issue * on the plea, and take his judgment for the unanswered part as by *nil dicit*. **285** And we are told, that it is frequently judicious to plead only to part, or to admit a part of the cause of action in order to save the costs of the trial of such matter; for, nothing can be tried, that is not put in issue; and the defendant, by declining to answer a part, deprives the plaintiff of the power to burthen him with the costs and expense of proving that, on a trial, which he has not denied, and put in issue. 1 *Chit. Plead.* 509. So, in equity, where the defendant fails, or declines answering any material part of the plaintiff's bill, as to which he seeks, and may obtain relief, it amounts to a tacit admission of so much; and, such part of the bill may, therefore, be taken *pro confesso*; and, if the declining to answer a part of the cause of action may, from any motives, be judicious at common law, certainly a defendant in Chancery may be induced for like reasons to pursue a similar course; since no costs, or expense, can be allowed in Chancery, any more than at law, for the proof and trial of any matter not put in issue. 2 *P. Will.* 557; 19 *Johns. Rep.* 505; 2 *Desau.* 172. Upon the whole, this rule in relation to pleadings in equity, appears to be as fully sustained by analogy to the course of the common law as by direct and positive authority.

There is, in many instances, a strong disposition manifested by Courts of Chancery to harmonize their proceedings, in principle, with the positive rules of the common law. But, where the Legislature have prescribed rules of proceeding for the Court itself; and cases occur within the spirit, but not within the letter of them, the Chancellor feels himself, not merely invited, for the preservation of harmony, but becomes sensible of a duty to conform, upon the ground, that equity is bound to follow the law in spirit and in principle.

In equity, the consequences of a default before appearance, when pursued to the utmost, seldom enabled the plaintiff to obtain the precise relief he was in quest of; because, there could be no adjudication upon his case, applying the remedy, as specific performance, or the like, exactly to suit it, until the defendant had appeared, and the allegations of the bill had been * taken for true or established. The English Courts, evidently under a strong sense **286** of the necessity of there being some better mode of attaining justice, than by a sequestration of the defendant's estate, have carried the doctrine, in relation to substituted and constructive summons, full as far as was within the compass of judicial power; further than it ever was in this State, and yet, short of the point of manifest and general utility. In the year 1718, the Legislature partially interposed, and by the Act of 5 Geo. 2, ch. 25, provided the means of

enabling a plaintiff to proceed against a defendant, who had not entered his appearance, and have his bill taken *pro confesso*; which could not be done in equity until then. 2 *Atk.* 23. This statute was introduced and used in this State, *Kil. Rep.* 189, and seems to have been the original settler among us; whence sprang that numerous family of legislative enactments upon this subject, to be found in our statute book, from the year 1773 down to the present time.

The following is a list of the Acts of Assembly under which a bill may be taken *pro confesso* against a defendant, who has not been summoned nor has appeared: 1773, ch. 7, sec. 3; 1785, ch. 72, sec. 30, 31; 1787, ch. 30, sec. 1; 1790, ch. 38, sec. 3; 1792, ch. 41, sec. 2, 4; 1794, ch. 60, sec. 2, 3, 5, 9; 1795, ch. 88, sec. 1, 2; 1797, ch. 114, sec. 2, 3; 1799, ch. 79, sec. 3, 4; 1804, ch. 107, sec. 2; 1820, ch. 161.

These Acts provide for all the cases that have, or, as it is supposed, can occur; absent or absconding defendants; non-resident defendants, who are either *non compos*, infants, or adult; absent or non-resident mortgagors; defendants who evade the service of the *subpœna*; the case where there are two or more defendants, of one or some of them being non-residents; the case of a bill of revivor, where the party had moved out of the State, &c. And where a party had been returned summoned, but had failed or refused to appear and answer, the Acts of 1785, ch. 72, sec. 1, 9; 1799, ch. 79, sec. 1, 2; 1820, ch. 161, provided that the plaintiff may, according to a prescribed mode, have his bill taken *pro confesso*.

According to the course of the English Court, there are cases in which an implied confession is held to be a sufficient ground
287 * for a decree; as where the defendant appears, and has been attached for not answering, and is brought three times from prison into Court, and has the bill read to him, and refuses to answer; such public refusal in Court amounts to a confession of the whole bill. So too, where a person appears and departs without answering, after which process has gone against him to sequestration, there also the bill is taken *pro confesso*; because, it is presumed to be true when he has appeared and departs in despite of the Court, and withstands all its process without answering. *For. Rom.* 36. But, these modes of having a bill taken *pro confesso*, having been deemed in many respects too oppressive, or unnecessarily tedious, 1 *John. C. Rep.* 8, more easy and expeditious modes having been provided by the Acts of 1785, ch. 72, sec. 20; 1779, ch. 79, sec. 2, 9; and 1820, ch. 161, sec. 1. By these acts, if a defendant, who has appeared, fails to demur, plead, or answer, according to the rules of Court, within a limited time, the bill may be taken *pro confesso*.

At law, where the nature and amount of the plaintiff's demand may be distinctly ascertained from the declaration, as in debt assumpsit, upon a promissory note, or the like, the judgment by *nil dicit*, is final; but in actions for the recovery of damages only, it is not so; because the amount claimed is uncertain; and, therefore,

an enquiry must be made, and proof heard as to the *quantum* which the plaintiff is entitled to recover. Suits in equity are susceptible, in some degree, of a similar classification; and, hence it is, that several of our Acts of Assembly, which allow the bill to be taken *pro confesso*, go on to declare that the Chancellor may, in his discretion, order a commission to issue for the plaintiff to examine witnesses to prove the allegations of his bill; or the plaintiff may himself be examined on oath. But in some of these Acts such a provision was omitted; and hence, by the Act of 1799, ch. 79, sec. 5, it is said to appear unreasonable, that, in any case whatever, the Chancellor should be directed absolutely to take the bill or bare allegations of a suitor *pro confesso*; and, therefore, enacts that, in all such cases, it shall be at the discretion of the Chancellor, either to take the bill *pro confesso*, * or to direct a commission for taking depositions *ex parte*; which law, as amended by the Act of 1818, ch. 193, **288** sec. 6, 5, has enabled the Chancellor to call for proofs and explanations in all cases which appear to require it.

These, then, are the legislative rules in regard to the whole bill, where no answer at all is put in. But not one of these Acts of Assembly which seem to have provided, with such an infinite deal of care and solicitude, for all the various causes and modes of neglecting or failing to answer the whole bill, do, in any manner, speak of, or allude to the case of a neglect or refusal to answer a distinct or material part only of the bill; where an answer is made to all the rest. The Act of 1795, ch. 88, sec. 1, says the bill may be taken *pro confesso*, and the Chancellor shall proceed to decree in the same manner, as if the defendant had admitted by his answer the facts stated in the bill; and in case the defendant has been summoned, or has appeared, and fails to answer, he must be ordered to do so, by an appointed day; or an interlocutory decree may be entered on the default, and a commission issued *ex parte*; but, in every case the consequence of the default is, that the bill may be taken *pro confesso*.

Hence it appears to be clear, that these legislative rules which, according to their letter, are only applicable to the case where there is no answer at all, must, in spirit and principle, be alike applicable to the case where the answer only covers a part of the material allegations, and is totally and absolutely silent as to the residue of the bill; and, consequently, according to the principle and spirit of these legislative rules, the unanswered part of the bill must, on the hearing be taken to be true; otherwise, there would be a manifest inconsistency in the course of the Court; and although a party might have a right to relief in Chancery, and be entitled to an answer to every allegation in his bill, necessary to sustain his claims to relief; if the defendant failed or refused, to answer them all, he might have his bill taken *pro confesso*; yet, if he failed or refused to answer a part of those allegations, for such part unanswered, he must pursue a different course. But the reason and principle being the same, the

289 rule must be the same in both cases. If the whole bill is * left unanswered, it may be taken for true; and if a part only be left unanswered, that part must in like manner, be taken for true.

These Acts of Assembly of ours, allowing a bill to be taken *pro confesso* on the defendant's default in not answering all of them, authorize the Chancellor in such case to pass a final decree at once, if he deems it unnecessary to issue a commission. The decree by default, in all such cases, is as completely final and absolute as a judgment by default in an action of debt at common law. The course of the English Court of Chancery is, in some respects, different. There, when the plaintiff obtains a decree by default, a provisional clause is superadded, that such decree is to be binding on the defendant, unless being served with process, he shall, within a limited time, shew cause to the contrary. And this decree, being *sub modo* only, is emphatically a decree *nisi*; which cannot be, nor ever is considered as final, until the party has been served with process, and it has been made absolute by the Court itself. 1 *Harr. Pr. Ch.* 625; *Redes Tr.* 195.

This, it seems, has long been the established practice of the Courts of Chancery of Virginia; so, that where a defendant has not answered the bill, it is held to be error to enter a final decree against him, taking the bill *pro confesso*, without the previous service of a decree *nisi*. 3 *Mun.* 83; 2 *Hen. & Mun.* 19. And it has also been held in that State, that, where some of the allegations of the bill were not answered, the plaintiff might either except to the answer as insufficient, or move to have the unanswered part of the bill taken *pro confesso*. But, if he does neither, it must be proved, that he shall not, on the trial, avail himself of any implied admission by the defendant; for, where the defendant does not answer at all, the plaintiff cannot take his bill for confessed without an order of Court to that effect, and having it served on the defendant; and this is the only evidence of his admission: of course, if this mode of proceeding as to the confession of the whole bill be correct, it must be equally correct as to the confession of any part. 2 *Hen. & Mun.* 17, 19; 2 *Mun. R.* 298-86; 4 *Rand. R.* 454; 6 *Cran.* 51.

290 * Such is the rule of the Chancery Courts of Virginia. The default in not making any answer at all; and that of not answering all the allegations of the bill, are precisely alike in kind, differing only in degree; hence, the Courts of that State have applied the same rule, in spirit and principle, to both defaults. The party is allowed to pursue the same course to have his bill, either wholly or partially taken *pro confesso*, according to the extent of the defendant's default. In this State no decree, *nisi*, is ever entered and served on a defendant who has not answered; but an absolute decree may be entered at once, as soon as he can be fixed with the default; which can be at any time after the limited period for answering has elapsed, or when he has elected to make, and has

actually filed his answer to the bill. The principle and reason of the rule in Virginia and in Maryland, are the same in relation to a partial answer. The Courts in each State follow the spirit of the established or legislative rule, which directs the mode of proceeding, in case the defendant puts in no answer at all.

The plaintiff is entitled to an answer to each allegation of his bill, which he may require; either because he cannot prove the facts, or to aid his proof, or to avoid expense; and if the plaintiff conceives the answer to be insufficient to the charges in the bill, he may except to it; which has been compared to a demurrer at law, for want of form. The sole object of exceptions is to extract from the defendant a more full and perfect disclosure for the benefit of the plaintiff. They are never meant, nor intended, nor are they calculated to benefit the defendant, or to put him upon his guard in any respect whatever. The plaintiff may, if he chooses, waive his right to except; and it is always most judicious to do so where his proofs are ample and at hand; and the character or conduct of the defendant indicates that he is not altogether trustworthy upon oath; for in such case he will attain his object much sooner and better by taking the answer at once, as he can get it, and proceeding directly to collect proofs, without loss of time, than by stopping to take exceptions. This is the case where the answer is an evasive, *imperfect response; but yet such a one as goes to the whole bill, and by **291** which each of its allegations is denied and may be put in issue. But to what end, or for what purpose, where no explanation or discovery is sought for by an allegation, should the plaintiff by exceptions call for an answer to it; where it is impliedly and tacitly admitted by not being answered. In such case, both parties would be delayed and troubled, and the defendant put to much expense without any object whatever.

The general replication puts in issue only the denial or avoidance of the answer, nothing more; and neither party is allowed, nor can be called on, to adduce proof respecting any matter not put in issue. The unanswered part of the bill therefore must be admitted, since it cannot be, according to a correct and orderly course of proceeding, proved at the hearing. But if the unanswered allegations of a bill were required to be proved, or to be rejected altogether at the hearing, then the defendant would be allowed to take advantage of his own laches; and a want of frankness and simplicity, altogether unbecoming a Court of equity, would be tolerated and encouraged; and the plaintiff would be driven to except, in all such cases, merely to extract from the defendant, either a general denial, or an express, instead of a tacit disclaimer or confession; when, in truth, it might have been the intention of the defendant, as it is fair to infer it was, to concede the unanswered allegation, for the express purpose of avoiding the costs and expense of an answer, of exceptions, and of

proofs, by letting a decree by default go for so much as he had left unanswered.

In ancient times, when the defendant used only to set forth his own case, in the answer, without answering every clause of the bill, it was the practice for him to add, at the end of the answer, a general traverse, without that, that the matters set forth in the bill are true, &c. But, where the whole bill, and every clause in it, has been fully answered, the adding of a general traverse is rather impertinent than otherwise; and, if issue is taken upon its general traverse, it is a denial only of everything not answered before by the answer. 2 P. Will. 87. But there is no case in which this general traverse

292 has ever been *relied upon as an answer. If it ever had been so considered, it must have occurred in some of the numerous cases of exceptions to answers, to have insisted on it as such; yet nothing of the kind appears. The whole range of adjudged cases shew, that the extent and compass as well as the sufficiency of the answer, as whether it is as frank as it ought to be, or whether it covers the whole, or only a part of the bill, are to be ascertained from the body of the answer itself, and not from the formal introduction, or the formal general traverse or conclusion of it. But in this case the usual general traverse, denying the truth of all the unanswered allegations of the bill, has not been added by the way of conclusion to any of the answers.

In the case of *Hopkins vs. Stump et al.* 2 H. & J. 301, Chancellor HANSON says, "it would seem likewise, that the complainant misunderstood the Chancellor in another particular. But no person, acquainted with the laws, or rules, or practice of this Court, would conceive it the meaning of the Chancellor, that whatever matter stated in a bill is not denied, must be considered as admitted. No! If interrogatories stated in a bill are not answered, the complainant has a right to except to the answer, and if the interrogatories are proper, the defendant will be compelled to answer plainly, fully and explicitly. If then any material matter charged in the complainant's bill has been neither denied nor admitted by the answers, it stands on the hearing of the cause for nought; this assuredly every lawyer will admit."

This language is strong, indicating that it came from a mind at home upon the subject before it, and that it was thoroughly and perfectly satisfied of the correctness of the positions thus advanced. But, to the latter of them, my mind cannot yield its assent; and, therefore, I have deemed it a respect due to the memory of my predecessor to set down the authorities and the reasons which have led me to a different conclusion. From all that has been said upon the subject, it appears to be agreed on all hands, that the plaintiff being entitled to an answer to each allegation contained in his bill, may except to an answer which omits to respond to any of them; that, in Virginia, the plaintiff, by a certain prescribed mode of proceeding,

may have the *unanswered allegations taken for true, but if he omits to take that course for that purpose, and goes to hearing, he must then prove the truth of the unanswered allegations, or they will be disregarded; that according to Chancellor HANSON, the unanswered allegations stand on the hearing of the cause for nought, and that in my opinion all material allegations of the bill, as to which the answer is entirely silent, are on the hearing, to be taken *pro confesso*. **293**

A fifth general rule is, that where an answer in the body of it purports to be an answer to the whole bill, but the respondent declares, that he is entirely ignorant of the matters contained in the bill, and leaves the plaintiff to make out the best case he can, or any language to that effect; and, the plaintiff files the general replication; all the allegations of the bill are thus denied and put in issue; and consequently, all of them, must be proved at the hearing against a defendant who has thus answered. 1 Ves. 274.

This in England, is said to be the usual form of the answer of the Attorney-General; and no exception can be taken to such an answer; or, indeed, to any answer of the Attorney-General. 2 Mad. Ch. 335. The same form and rule prevails here, where the Attorney-General appears for the State. This also is commonly, the form of the answer of an infant, or a person *non compos*, who answers by his guardian or committee. And, by a long established practice, individuals, who are, in truth, ignorant of the whole matter as to which the bill requires any disclosure; but who are made defendants as having an interest in the matter in controversy, have been permitted, by this general mode of answering, to deny the whole bill, and to put the plaintiff to prove all its allegations at the hearing. 6 H. & J. 291. If, however, it appears from the bill, that the defendant has any knowledge of any matter in it, he may be required to answer more fully and particularly to the extent of his knowledge or belief.

Divesting this case then, of all extraneous matter; of all that relates to the two first administrators of the late Anthony Hook; because, this plaintiff is incompetent, in the representative character in which he sues, to recover any thing, but so much of * the personal estate of his intestate as remains in specie, or has remained, and is now in the hands of any one, who can be regarded as a trustee for the use of the late Anthony and his representatives; of all that which relates to the next of kin of the late Anthony Hook; because none of them, as such can have any title, but from one of his administrators, and no such title is alleged or pretended; and also, because none of them are made parties to this suit as plaintiffs; and Barbara Hagthorp and James Hook, who have been made defendants, are neither charged as, nor make any claim or defence in right of their being two of the legal representatives of the late Anthony Hook; and the case, when thus cleared on the part of the plaintiff, is simply this. **294**

By a deed bearing date on the 17th of August, 1797, the late Anthony Hook conveyed certain property, therein mentioned, to the late John Hook, on the terms specified in the deed; which property came to the hands of the late John, and after his death, passed into the hands of Hagthorp and wife, as his administrators; and is now held and detained by them, and the other defendants, who claim from, and under them. The plaintiff alleges that this property, according to the nature and terms of the deed, was conveyed to John, as an indemnity; in case and upon condition, that he should pay certain debts, therein specified, which have not been paid; and, consequently, that the late John Hook had held, and his legal representatives, and those who claim under them, now hold this property as trustees, for the use of the late Anthony Hook and his legal representatives; who is now the present plaintiff; upon which the complainant prays that this property may be accounted for and delivered up, together with the profits thereof.

The whole of this controversy has grown out of the deed of the 17th of August, 1797, from the late Anthony Hook to his son, the late John Hook. This indenture recites, that Anthony, being justly indebted to John Moale, and thirteen other persons who are named; but the amount due to any, or all of them, is not specified: and then declares, that John had agreed to pay those creditors of his father, Anthony, their several and respective * debts; in consideration of which, and also in consideration of natural love and affection for his son; and of the further consideration of five shillings, Anthony conveyed to John his leasehold right, to two pieces of land; the one a lot of ten acres, part of the tract called David's Fancy: and the other a lot, fronting on Aliceanna street, in the City of Baltimore, together with certain negroes and personal property; all of which are particularly described. The indenture then concludes in these words: "To Have and to Hold the said ten acre lot, and the other lot on Aliceanna street, for and during all the rest, residue, and remainder of the original terms granted for each respectively, subject to the rents and covenants reserved and contained in the above, in part, recited lease and assignment: and To Have and to Hold all and singular the household and kitchen furniture, plate, and negroes, unto him, the said John Hook, his executors, administrators, and assigns, forever. Provided always, and it is the true intent and meaning of these presents, and of the parties hereto, and if the said John Hook, his executors, administrators, or assigns, shall absolutely omit, neglect, and refuse to pay the said recited creditors of the said Anthony Hook, their several and respective just debts and demands against the said Anthony Hook, then this indenture, and every matter, clause, and thing therein contained, shall cease, determine, and be utterly null and void, to all intents and purposes whatsoever; any thing herein contained, to the contrary thereof, in any wise notwithstanding."

This proviso, or condition, is explicit and unequivocal. The estate conveyed to John Hook, was to be null and void, on his failing to pay and satisfy the enumerated creditors of Anthony Hook. It is, in fact, a conveyance, by Anthony, of certain property to John; upon condition that he should advance a certain sum of money for the use of Anthony. This proviso, with the recital, gives to the whole the shape and character of a pledge or mortgage, from Anthony to John. It was intended to indemnify John, for money advanced by him to the use of his father: and all John can claim, by virtue of this deed, is indemnity and reimbursement for any money so by him advanced. In * the ordinary cases of a mortgage, the grantor is the actual debtor of the grantee: and it is stipulated that the estate conveyed, shall be absolute, if the grantor fails to pay at the appointed time. In this case, the grantee undertakes to substitute himself in the place of the creditors of the grantor, or to satisfy those claims: and if he fails to do so, then it is stipulated that the estate conveyed, shall be void. The object of the grantor, in both cases, is the payment of his debts; and, in both, security is the object of the grantee. That security, in equity, extends no further than complete reimbursement. The payment of the whole principal and interest due, and no more. 9 *Wheat.* 495. There is no clause in this indenture authorizing John Hook to sell the property, and to apply the proceeds of the payment of the claims of the enumerated creditors: and even if there were, it would not have destroyed the redeemable quality of this mortgage, or the resulting use arising out of the nature of this deed. 3 *H. & J.* 106. In this case it is alleged, that the late John Hook, and his representatives, have altogether failed to pay the enumerated debts, in compliance with the stipulations of the deed. If so, Anthony Hook had, and his representative now has, a right to a return of this property, with its profits: or, at least, to redeem it on the payment of so much as has been advanced by John Hook, or his representatives. **296**

It has been urged, that there is not the least room to deduce, from this deed, any thing like an implied or resulting use to Anthony Hook, and his representatives; because, it is declared to have been made, not only for a valuable consideration, as the payment of debts, and also of five shillings; but likewise for a good consideration, as the natural love and affection from the father to the son.

The doctrine of a resulting use, first introduced the notion that there must be a consideration expressed in the deed; or, otherwise, nothing could pass—but it would result to the grantor. It is certain, however, that the rule in relation to trusts, by implication, or operation of law, is by no means so large as to extend to every mere voluntary conveyance; and, consequently, if this deed stood alone, upon the valuable consideration of five * shillings, and upon the good one of natural love and affection, or upon **297** either of them, unconnected with other circumstances, there could

be no doubt of its validity, as an absolute, and effectual conveyance, from Anthony to John. 2 *Atk.* 256. But, when other matters are necessarily brought into view, or form a part of the contract, then it is no less clear, that the mere express consideration of five shillings, even with the superadded expressions, "and of other valuable considerations," or of natural love and affection, will not prevent the deduction of a trust by implication or operation of law. 1 *Ves. Jun'r*, 92; 1 *Atk.* 93, 191; 2 *Atk.* 149. And where a trust is declared as to part, or the property is to be applied for a particular purpose, and nothing is said of the residue; what remains, so undisposed of, results to the grantor. 2 *Fonb.* 116, 133.

This indenture cannot be read with a total disregard of its recital and proviso, two of its most important features. We cannot turn aside from clauses, so very striking and efficient, as the recital of the cause of its having been made, and the proviso wherein it is said, if that consideration alone be not complied with, the whole shall be a nullity. If these matters could be entirely passed over, the argument against a resulting trust would be exceedingly strong, if not altogether irresistible. But, looking to the recital, and the proviso, it is perfectly manifest, that the sole object of the deed was to secure the payment of certain creditors of Anthony Hook. If they were not paid, the whole deed, utterly regardless of the consideration of five shillings, and of natural love and affection, was declared to be void. The payment of the creditors was, then, that consideration alone upon which the conveyance was to stand or fall. This is the real extent of the consideration, no more; and to this extent, and no further, the late Anthony Hook parted with his right and interest in this property: consequently, in the value of this property, beyond that of the aggregate amount of the specified debts, there is an implied or resulting use, remaining or vested in Anthony Hook, the grantor, and his representatives.

But, there is an express saving in the Statute of Frauds, of trusts by implication or operation of law; nor does the statute * affect
298 trust of mere personalty. 10 *Mod.* 404; 3 *Bro. C. C.* 587. Such uses, therefore, might in this case be established by parol proof, if this were not sufficiently manifest from the terms of the deed itself. 2 *John. C. Rep.* 409. Let us now, then, turn to the answer and proofs.

Hagthorp and wife have answered jointly. She, before her marriage with Hagthorp, obtained letters of administration on the personal estate of her late husband, John Hook, and it is in that character only, that they are now brought here as defendants. They say, in relation to the enumerated creditors of the late Anthony Hook, "that the said John Hook paid the said sums of money, set out in the assignment, so far as the creditors applied for payment of the same:" and again, "that the said John Hook accordingly paid the

debts particularly mentioned therein, (that is, in the deed,) as these defendants believe and charge.”

It is too late now to inquire whether this answer is as frank and unexceptionable as it ought to have been or not. The only question at this stage of the proceedings, is, whether it be such a response to the bill as constitutes a sufficient defence, if uncontradicted by proof; or whether, as is often said on motions to dissolve injunctions, the answer has sworn away the equity of the bill?

The first of these sentences cannot be considered as a distinct answer to any extent; either, that the debts have, or have not been paid: and the second of them amounts to no more than a declaration of a belief that they have been paid. Where the nature of the transaction, charged in the bill, is such a one as must have been altogether within the knowledge of the intestate, the administrator may answer as he is informed and verily believes; but, the answer of an administrator must always be taken, as well with a reference to the reasons given for his belief, as to the nature of the subject of which he speaks. This, however, is a broad assertion of a belief, without giving any reasons for it; or its appearing, or being alleged, that the matter was exclusively within the knowledge of their intestate. In these particulars, this answer is not so responsive to the bill as to constitute an available defence.

* But, according to the bill and the deed, which is made a part of the bill, John Hook undertook to pay certain debts 299 due from Anthony Hook. The answer to this charge must, then, from the nature of things, be such a one as would furnish evidence available to Anthony or his representative; it is that, the bill seeks. For, by the deed, Anthony was to be protected from the claims of his creditors; and upon John's affording that protection his title rested. In effect the bill asks, not only whether the debts have been paid, or not; but more, it requires the evidences of their payment to be produced, as a means whereby Anthony, and his representatives, may be protected against those claims; and such evidence, in addition to anything that might be said in the answer, is also necessary; because it constitutes an affirmative part of that title set up by John Hook's representatives, in opposition to the plaintiff's claim; and must therefore be supported by indifferent testimony. All the claims of the enumerated creditors which have not been paid, it is most likely have been long since barred by the Statute of Limitations; but that is a protection which the law itself gave to Anthony. He is entitled, by the terms of his deed, to be furnished by John with the evidence of their being satisfied, as a means of his protection in that form. This answer, therefore, is not for these reasons also, so responsive to the bill as to afford the defendants an adequate defence. On adverting to the proofs and exhibits, it appears that John Moale's is the only one of the specified claims that has been satisfied; and none others are to be allowed as paid.

I lay out of this case the testimony of Henry Burman, who, as the husband of one of the distributees of Anthony Hook, has an interest in establishing the facts to which he testifies, and is, therefore, incompetent. All the other witnesses are competent. From the copy of the unexecuted bond, the declarations of Bishop Carroll, and the other occurrences and proceedings in the Orphans' Court found among the proofs, it appears to have been perfectly well understood between Anthony and John, during their lives, that John held, as the trustee of Anthony, according to the terms of the deed: and it appears that
300 the representatives * of John always admitted, that they held under the deed; and yet, except the claim of John Moale's it does not appear, that they ever undertook to show, that any of the claims of the enumerated creditors had been satisfied. It lay upon John and his representatives to show, that those claims were paid; and they have not done so, and the truth is therefore, that, except Moale's claim, none of them have been satisfied.

The answer of Hagthorp and wife, after some preliminary notices of several allegations in the bill, and those responses, as to the payment of the enumerated debts, passes on to a long history of the sayings, actings, and doings of sundry of the next of kin of the late Anthony Hook, in relation to the ten acre lot; as to all of which, for the reasons already assigned, it will be unnecessary to say anything further. The bill specially charges, that Hagthorp and wife, by a deed dated on the 23d day of December, 1819, leased, or assigned a part of the lot on Aliceanna Street, to Matthew Bennett. Of these special allegations, these defendants take no notice; but say, that the late Anthony Hook, by an indenture dated on the 8th day of May, 1797, conveyed the lot on Aliceanna Street, to the late Anthony Hook. This is an allegation in avoidance of the bill, and certainly required to be supported by proof. But there is not even an exhibit, nor one tittle of proof in relation to it. This part of the answer, therefore, passes for nothing.

As to all the allegations of the bill, in relation to the negroes, and other movable property mentioned in the deed, this answer is absolutely and totally silent—it says nothing; and consequently, as to so much the bill must, according to the rules that have been laid down, be taken *pro confesso*.

Upon the whole, then, and from what has been said, it follows that the defendant, Hagthorp and Wife, as the legal representatives of the late trustee, John Hook, will be decreed to deliver up to the plaintiff, all the property mentioned in the deed; or to pay the value of so much as they may have converted, or fail to deliver, together with the profits thereof, or the interest on the value; except certain allowances, and those parts wherewith the other defendants may be charged, as I shall now proceed to enquire and determine.

301 * All the other defendants deduce their title, either directly or indirectly, from Hagthorp and wife, except Nathaniel

Chittenden, who traces his claim from the late John Hook. But all allege, that they are purchasers for a valuable consideration, without notice. There is no principle of equity better settled, than that such a purchaser will not be disturbed by this Court. On the other hand, it is equally well settled, that he who purchases with a knowledge of the trust, becomes himself the trustee, and stands in the place of the vendor, under whom he thus claims, subject to all his liabilities. Yet a person having himself notice, who purchases of one who had not notice, may protect himself by the want of notice in his vendor; nor shall a purchaser without notice, or a previous purchaser with notice, be affected by the notice of his vendor; and where a purchaser cannot make title, but by a deed, which leads him to a knowledge of the fact; and more especially where the deed, by virtue of which he takes, recites, or directly refers to that instrument in which the trust is declared, or from which it arises, he shall be deemed cognizant of the fact, and a purchaser with notice. These are the well established principles of equity upon this subject. 2 *Fonb.* 147, 151.

William McMechen, in his answer, avers that he is a purchaser, for a valuable consideration, without notice; and yet makes an exhibit, by his answer, as a part thereof, of a deed dated on the 9th of September, 1803; under which he takes from Hagthorp and wife, in which the indenture from Anthony Hook to John Hook, out of which the trusts arise, is clearly and distinctly referred to as one of the links in the chain of the title of Hagthorp and wife. This, of itself, is enough to shew that McMechen is a purchaser with notice. But the proofs leave no doubt upon the subject; they shew, that he had ample notice.

This defendant, therefore, will be decreed to deliver up and reconvey to the plaintiff whatever of the ten acre lot, thus acquired by him, he may now hold; and to account for the rents and profits thereof, from the date of the deed under which he obtained possession, with such just allowances as he may be entitled to; the nature of which shall be specified.

* Samuel Moore and George A. Hughes answer jointly; they positively aver, that they are purchasers of William McMechen, **302** for a valuable consideration without notice. But they exhibit no evidence of title, nor any proof of right whatever. According to the rules and principles before laid down, they cannot be permitted thus to swear themselves into the estate of the plaintiff; and consequently, even if their answer were in other respects fully responsive to the bill it could not avail them as a defence, unsupported, as it is, by proof. These defendants will, in like manner, be decreed to deliver up and reconvey to the plaintiff the property held by them; and be also charged with rents and profits, from the 1st day of May, 1818, when it appears they obtained possession.

John Cator, by his answer, states, that he purchased of McMechen, that which he holds. His predicament and pretensions are similar;

in all respects, to those of Moore and Hughes.—Cator, therefore, will likewise be decreed to deliver up and reconvey, and also to account for the rents and profits of what he holds, from the 1st of May, 1818; when he was let into possession, with such just allowances as shall be specified.

John S. King, by his answer, states, that he leased from the defendant, Cator; but having exhibited no better title than his lessor, will be in a like manner, ordered to deliver up, reconvey, and account for the rents and profits, to the plaintiff, from the 9th of March, 1819, when he took possession.

John Weaver, in his answer, says that he, too, is one of those who purchased of William McMechen. This defendant has also left his answer entirely destitute, and wholly unsupported by any exhibits or proofs. He will, therefore, be decreed to deliver up, reconvey, and account for, the rents and profits to the plaintiff. He admits that he obtained possession in the year 1819; but does not specify the day or month. A medium, in the absence of proof, will, therefore, be taken; and the account will commence on the 1st day of July, of the year 1819, with such just allowances as shall be specified.

The defendant, John Fitzgerald, in his answer, states that on the 4th of September, 1806, he purchased of John H. Hall, a
303 * part of a parcel of ground, containing ten acres; part of a tract of land called David's Fancy; that he gave for it a valuable consideration; and had no notice of the claim of the representatives of the late Anthony Hook. He then goes on to state, that he purchased of the defendant, Hagthorp, two other parcels of the same ten acre lot; the one on the 9th of August, 1810, and the other on the 17th of June, 1815; and that he purchased a fourth parcel of it, on the 17th of September, 1811, of Gerard Tipton; for all of which, he avers, he paid a valuable consideration, and that he had no notice of the claim of Anthony Hook's representatives. This answer is also entirely unsupported by any evidence whatever; and, therefore, this defendant will be decreed to deliver up, and reconvey to the plaintiff so much of the ten acre lot, mentioned in the bill, as he holds; and will, also be held accountable for the rents and profits thereof, from the dates when he obtained possession of each parcel respectively. The nature of the just allowance to which he may be entitled, will be described.

Benjamin Rawlings, surviving executor of the late William Rawlings, states, that his co-executrix, Catharine Rawlings, who had been made a defendant, is dead; that he is in possession of part of the ten acre lot in the bill mentioned, by virtue of a deed bearing date on the 10th of September, 1804. This answer is also entirely unsupported by proof. This defendant will be decreed to deliver up and reconvey the property, so held by him to the plaintiff; and be charged with the rents and profits, as executor, from the date of the

under which his testator obtained possession; with such justances as shall be specified.

The defendant, Matthew Bennett, in his answer, says, that he is in possession of a part of the ten acre lot mentioned in the bill, which he holds under a conveyance from Hagthorp and wife, dated on the 1st day of August, 1810. But this defendant, too, has left his answer wholly destitute of proof. The bill expressly alleges, that Hagthorp and wife, by deed, dated on the twenty-third day of December, 1819, conveyed a part of the lot on Aliceanna street to Matthew Bennett; in relation to which, this * defendant says nothing in his answer.

The allegation of the bill, as against him, must therefore be taken for true. He will be decreed to deliver up, and reconvey all property held by him, to the plaintiff; and to account for the rents and profits of each parcel from the time he took possession. **304**

The defendant, Nathaniel Chittenden, admits that he holds possession of the lot on Aliceanna street, to which he derives title, through various mesne conveyances, from the late John Hook. He admits that he, and those under whom he claims, were, all of them, purchasers for a valuable consideration, without notice; but produces no proof in support of the allegations of his answer. He will, therefore, in like manner, be decreed to deliver up and reconvey the property so held by him, to the plaintiff; and be held accountable also for the rents and profits.

The defendant, James Hook, on the 7th day of February, 1823, filed his answer; and he says therein, to the amended bill of the plaintiff; but there does not appear to have been any amended bill put upon the record until some time after that day. There is, however, no charge whatever made against this defendant, and therefore the bill will be dismissed, as to him, with costs.

We have said, that the recital and proviso in the indenture of the 1st day of August, 1797, from Anthony Hook to John Hook, gave to the instrument the features and character of a mortgage. Consequently, the original parties stood and their legal representatives stand in the relation to each other of mortgagor and mortgagee, trustees, and *cestui qui trusts*. No acts, or circumstances appear to have occurred to destroy the redeemable quality of the deed. Hagthorp and wife, as administrators of the late John Hook, have succeeded to his character of trustee, and the defendants, all claim under them, except Nathaniel Chittenden, who derives his claim from the late John Hook, as purchasers with notice for so long as they hold, stand charged with the same trusts.

The whole of the property mentioned in the bill has been continued in the possession of the late John Hook, and those who have succeeded to, and claim under him, ever since the * year 1797.

They have protected it, relieved it from burthens and charges, and have placed upon some parts of it lasting improvements. It **305**

now, therefore, only remains to apply the rules of equity in relation to these matters, and to direct how the accounts shall be stated.

If a mortgagee, without the assent of the mortgagor, assigns the mortgaged estate to an insolvent person whom he puts into possession, he will be held answerable for the rents and profits received both before and after the assignment; upon the principle, of its being a wilful breach of trust, to transfer the property to another, which, as trustee, he had no right thus to dispose of, to the prejudice of the mortgagor. *Pow. Mort.* 948; 2 *Fonb.* 179. A trustee is, in no case, to be charged with imaginary values, but only with what he actually receives; and the same rule applies to a mortgagee, in possession, who is regarded as a trustee. But no default must be imputed to him; for in all such cases, he will be charged with what he might have made, but for his default. The annual value is that which the premises are actually worth nett, according to a fair estimate, clear of all necessary charges.

Under the head of just allowances, it has long been the course of the Court to allow a trustee, or mortgagee in possession, for all necessary expenses incurred for the defence, relief, protection and repairs of the estate: such as costs of suit, and fees for taking opinions and procuring directions necessary for the due execution of the trusts, 10 *Ves.* 184, taxes, paving contributions, ground rent, and sums expended in necessary repairs. *Pow. Mort.* 956 n; 2 *P. Will.* 455. It has been also said and I think with justice, that where a mortgagee, thinking himself absolutely entitled, had expended considerable sums in repairs and lasting improvements, he should be allowed the value of them. *Pow. Mort.* 956 n. And in a modern case, the value of new buildings, erected by the mortgagee, was allowed, 4 *Ves.* 482, and a liberal allowance for the improved value of slaves while in the possession of the mortgagee, was directed to be made. *Ross vs. Worrall*, 1 *Wash.* 14. The grounds of these decisions appear to be,

306 that a mortgagee in possession, is the legal holder * of the estate; which the mortgagor may at any time redeem, and so prevent him from making any repairs or improvements, and if the mortgagee has been long in the possession, claiming adversely, and suffered to treat the estate as his own, and the mortgagor stands by and permits lasting improvements to be made, he shall pay for them. 5 *H. & J.* 147; 4 *John. C. Rep.* 122.

But the estimate of the value of such lasting improvements is to be taken as they are at the time of accounting or passing the final decree. For such allowances are made upon the ground, that the improvements do, in fact, pass into the hands of the plaintiff as a new acquisition. And they can only be a new acquisition to him, to the extent of their value at the time he recovers or obtains possession of them; and therefore their value at that time is to be allowed, and nothing more. 3 *Rob. Adm. Rep.* 101. It is also necessary to observe that in charging rents and profits, the estimate must not in-

clude any profits which arise exclusively from such improvements; for, if they were to be embraced by the estimate, the occupier would, in fact, be paying for the profits of that which was his own; and the plaintiff would be allowed to derive the benefit from a new acquisition before the Court had awarded it to him. Therefore, the estimate of rents and profits must be made, in exclusion of such as appears to have arisen from the occupying claimant's own expenditure in improvements. 1 *John. C. Rep.* 388.

In this case, the late John Hood disposed of the lot on Aliceanna street, and his representatives Hagthorp and wife, having disposed of the other property in a manner in which they had no right to do, and the bill standing unanswered, and for true, as to the negroes and movable property, Hagthorp and wife must be charged with the value of the whole of that property, and interest thereon, from the date of the deed from the late Anthony Hook to the late John Hook, and the account for the rents and profits of the chattels real, will commence from the same date. Hagthorp and wife must be charged with the rents and profits of all the chattels real, mentioned in the bill up to the time when they, or any part of either passed into the hands of any * of the present defendants. But Hagthorp and wife will be held liable for the whole amount charged **307** against the other defendants, or to the amount which all, or any of them may fail or be unable to pay to the plaintiff, and these defendants must be credited with the amount of the debt which was due from Anthony Hook to John Moale at the time of the execution of the deed to John Hook, with interest thereon, from the time when it appears to have been paid.

The account against each of the other defendants will commence from the day on which it appears by his answer, or by the proofs now in the cause, or which may hereafter be exhibited, that he obtained possession, and he will be charged for all the time that he held that portion of the property, or until it passed into the hands of another of the defendants. The account against each of the defendants who is now a holder of any portion of the property is, for so much as he holds, to be brought down to the time of taking the account.

Whereupon, it is ordered, on this 5th day of December, in the year 1826, that this cause be, and the same is hereby referred to the auditor, with direction to state on account, or accounts, accordingly; from the proceedings and proofs now in the cause, or such other proofs as may be laid before him by the parties: and it is further ordered, that the parties be, and they are hereby allowed to take such testimony as they may think proper, in relation to the accounts so directed to be stated by the auditor; on giving to the opposite party or his or their solicitor three days notice as is usual. Provided, that no testimony shall be used before the auditor, or, in any way admitted into this cause, unless it be taken and filed with the register, on, or be-

fore the 15th day of January next. From this order the defendants appealed to this Court.

The cause came on to be argued before EARLE, ARCHER, and DORSEY, JJ., when,

Williams, (District-Attorney of U. S.) and *Learned*, for the appellee, moved the Court to dismiss the appeal, upon the ground that an appeal did not lie from the order of the Chancellor * in this case, as it did not settle any question of right between the parties. *Snowden vs. Dorsey*, 6 H. & J. 114; *Thompson vs. M'Kim*, *Ib.* 327; *Oehler vs. Walker*, 2 H. & G. 326, 329.

Moale and *R. N. Martin*, against the motion, referred also to *Snowden vs. Dorsey*, and *Thompson vs. M'Kim*, and to *Strike vs. M'Donald*, 2 H. & G. 191.

DORSEY, J. delivered the opinion of the Court. A motion being made to dismiss the appeal to this Court, on the ground, that the Chancellor decided nothing in controversy between the parties which can properly form the basis of an appeal; to present a view of the question, but few of the facts contained in the record need be stated. The appellee sought to recover certain leasehold and personal property, with the rents and profits arising therefrom. The right to such recovery being resisted by the defendants, and much testimony in relation thereto, being taken under commissions issued for that purpose; after the case had been argued, the Chancellor, in his explanatory or introductory remarks to what he was then about to order, discusses at great length many rules and principles of equity and a great variety of facts, all of which he considers clearly in favor of the appellee, and announces his intention at some future time to decree accordingly: and to enable him to do so, he passed the following order, viz: (See the order *ante*, p. 307.)

From this proceeding of the Chancellor, the present appeal has been prosecuted; and the only question submitted to our consideration is, does this order so settle or materially affect all or any of the rights or interests in the controversy between the parties, as to make it a decretal order from which an appeal would lie agreeably to the provisions of the Acts of Assembly of 1785, ch. 72, and 1818, ch. 193? We are clearly of opinion that it does not. To ascertain what has been decided by the Chancellor, we must look to the order itself. If its expressions be explicit, unequivocal, we need search no further for its import; but must give it that interpretation which it bears upon its * face. If its construction be ambiguous; then, as the best key to its exposition we must refer to the introductory remarks of the Chancellor upon which it was founded. In the present order there is no doubt, no ambiguity; and its operation cannot be enlarged by the prefatory observations with which it is connected. Indeed, they are in perfect accordance with its literal, obvious mean-

ing; and demonstrate, that all which the Chancellor designed to adjudicate, was, that the auditor should state certain accounts indispensable to the termination of the questions in litigation. Such an order is a mere preparative to the decisions of the cause; and not decretal. 'Tis true the Chancellor, in considering this case, has discussed all the matters both of law and fact, which he deemed in any wise involved in the decree, eventually to be pronounced; and has distinctly declared what he intends to decree. But his intentions form no ground for an appeal; he may abandon or change them *ad libitum*; until carried into effect, no injury can result from them. It is only, from what he has done, and not from what he intends to do, that an appeal will lie. All that he has done is to direct an audit; every disputed right and interest of the parties remains undetermined; and is, by the express declaration of the Chancellor, to be settled by his future decree. Until such decree be passed, upon application a commission to take further testimony might issue, an unquestionable title to the relief prayed for might be made out. If we now sustain the jurisdiction we are called on to exercise, and, in accordance with the appellant's views, dismiss the appellee's bill of complaint: we deprive him of all such opportunity of strengthening his claims for relief; we in fact become a Court of original not of appellate judicature. We usurp the authority of the Chancellor, and reverse decrees which he never did make, and perhaps never would have made. Such a proceeding is utterly inconsistent with the character and attributes of a Court of Appeals.

But reasoning upon this subject is unnecessary; the question is put to rest by the authority of *Snowden et al. vs. Dorsey et al.* 6 H. & J. 114: a case not distinguishable from that now before us. There the Chancellor upon a bill filed for the * conveyance of land, ordered an account to be taken of the rents and profits; **310** and in the statement of his views introductory of that order pronounced his opinion (as here) that the complainants' claim to relief had been established. Yet, upon an appeal from such order, after argument, and a thorough examination of the practice and decisions upon the subject, this Court dismissed the appeal, as being prematurely taken from an order, not decretal.

It was urged in the argument of the appellants' counsel, that the right of appeal in this case was fully established by the doctrine settled in *Thompson vs. McKim*, 6 H. & J. 302. But the cases are in no wise analogous. There, as is justly observed by the Chancellor, to warrant the issuing of the order, the facts must be "either admitted or so established as to be open to no further controversy at any subsequent stage of the proceedings; and the party making the motion for such order must shew that he has an interest in the money called in; and that he who holds it in his possession, has no equitable right or title to it whatever." Here to justify the order for an audit, no such conclusive establishment of facts is indispensa-

bly necessary. There material and irreparable injury was done by the order, let the subsequent decree of the Chancellor be what it might, or although no future decree be ever made. Here no material injury is inflicted on the appellants unless followed by a decree; and that decree too against them. Here the order is not decretal or final as to the right or interests of the appellants. There the order is not only decretal, but in effect final upon the rights and interests of the appellants, and needed not the aid of any future decree or order upon the subject. *Ex natura rei*, the granting the order to bring the money into Court, adjudicated on every right and interest which the appellant claimed. In no future order or decree was it necessary to name or even refer to him; as to all subsequent proceedings, he was no longer a necessary party in Court. All that remained to be done in the cause was, an order for the distribution, among the creditors of Heyland of the money brought into Court.

311 * Strong efforts were made in the argument to distinguish this case from that of *Snowden et al. vs. Dorsey et al.* founded upon an expression in the Courts opinion, in *Thompson vs. M'Kim*, stating that the order passed in *Snowden et al. vs. Dorsey et al.* "bore no impress of the Chancellor's judicial opinion upon the merits of the case." The order, it was contended, in the case at bar, did bear such an impress. But the weight of the argument rests upon a misconception of this expression of the Court. They did not mean to say, that the introductory remarks to the order in *Snowden et al. vs. Dorsey et al.* bore no impress of the Chancellor's opinion upon the merits of the case; because the reverse is most palpably the fact: it does bear the impress of his opinion: but not of his "judicial opinion." The impress of the Chancellor's "judicial opinion," in the sense in which the Court have used it, being synonymous with what he has adjudged or decreed.

Appeal dismissed, but without costs.

DANELS vs. TAGGART'S Adm'r.—December, 1829.

T. died in a foreign country, leaving his partner K. his executor there; who, upon his return to Maryland, renounced all right to administer upon T's estate here. Letters of administration were then granted to the complainant, who filed a bill against K. and D. requiring an account and settlement of various claims; some of which related exclusively to transactions of a partnership which had subsisted between K. D. and T.; others, to demands of the intestate against both of his surviving partners; and others, to misapplications of the intestate's property, by both and each of them after T's death. The dates of these transactions were not alleged. To this bill, D. pleaded in bar, "That he finally settled and adjusted with K. executor of T. deceased, after the death of the said T. an account in writing, and by said account, the balance due to the defendant by the estate of the said T. on the 25th Oct. 1823, was admitted to be, &c. which account is just and true." The com-

plainant demurred. The Chancellor overruled the plea, and ordered the defendant to answer over. *Held*, that an appeal did not lie from this order, which decided a mere question of pleading, and settled no right between the parties, and that this plea was void for uncertainty. (a)

plea of an account stated to such a bill as the present, cannot be sustained, * unless it be supported by answer, denying the receipt of any part of the money, for which the defendant is called upon to account, subsequently to the time when the account stated, was adjusted. (b)

making issue on a plea in equity, the plaintiff admits its sufficiency as a bar, if the facts which it asserts are established by proof; and if on such an issue, the matter of the plea is proved, the bar is complete, and the bill must be dismissed. (c)

Approved in *Roberts vs. Salisbury*, 3 G. & J. 434. Cited in *Chappell vs. ...*, 57 Md. 473.

Approved in *Rouskulp vs. Kershner*, 49 Md. 524.

Approved in *Seebold vs. Lockner*, 30 Md. 137, and *Rouskulp vs. Kershner*, d. 522. According to the rules of equity pleading and the established practice in this State, the effect of filing a general replication is to admit the legal sufficiency of the plea, and to raise an issue of the truth of the facts therein alleged. If overruled for want of proof, the defendant must pay the payment of the fine of ten dollars imposed by Code, Art. 16, sec. 10, and is not allowed to answer the bill. *Seebold vs. Lockner*. "The proceedings upon plea filed" says the Court in the case last above cited, "is very analogous to the proceeding upon demurrer to the bill. If the plaintiff alleges the plea to be defective, either in form or substance, he may take issue upon it, and the judgment of the Court upon its sufficiency. This he does by setting the plea down for argument, instead of replying to it; for if he pursues the former course he thereby admits the legal sufficiency of the plea as a complete bar, if the facts be established. Upon argument of the plea it may be allowed simply, or the benefit of it may be saved to the hearing, or it may be ordered to stand for an answer; or it may be overruled. If, therefore, as the authorities say, a plea is allowed upon argument, or if the plaintiff, without argument, thinks it, although good in form and substance true in point of fact, he may take issue upon it, and proceed to disprove the facts upon which it is endeavored to be supported: and no order of the Court in merely passing upon the legal sufficiency of the plea should prevent the plaintiff from the right thus to controvert the truth of the facts alleged." In *Rhode Island vs. Massachusetts*, 14 Peters, 257, TANEY, C. J.

"According to the rules of pleading in the Chancery Court, if the plea is unexceptionable in its form and character, the complainant must set it down for argument, or he must reply to it, and put in issue the facts relied on in the plea. If he elects to proceed in the manner first mentioned, and sets down the plea for argument, he then admits the truth of all the facts stated in the plea and merely denies their sufficiency in point of law to prevent his recovery. If, on the other hand, he replies to the plea and denies the truth of the facts therein stated, he then admits that if the particular facts stated in the plea are true, they are then sufficient in law to bar his recovery; and if they are proved to be true, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. Undoubtedly, if a plea upon argument is ruled to be sufficient to bar the recovery of the complainant, the Court of Chancery will, according to its uniform practice, allow him to amend and put in

APPEAL from the Court of Chancery. The bill of complaint, in this case, was filed on the 9th of November, 1824, by William Taggart, administrator of Henry Taggart, (now appellee,) against John D. Danels, (the appellant,) and John C. King. The bill stated, that the testator, Taggart, Danels and King, as partners in trade, were the owners of a considerable amount of property and *choses in action*, and were largely indebted to others; that the testator, besides his undivided interest in this firm, had a large amount of separate property of his own, consisting principally of vessels, and of debts due from this firm of Taggart & Co. and others; that thus situated, Henry Taggart died, leaving his partner, King, as his executor; that afterwards Danels and King, took, collected, and applied, nearly the whole of the testator's property, as well as that which he had held in partnership with them, as that which was exclusively his own, and applied it to their joint use and benefit; that a part of the testator's property was taken and applied by Danels to his own individual use; and that King having renounced the office of executor of Henry Taggart in this State, administration was granted to the complainant, who now calls on Danels and King to account for the property so taken and used by them.

The defendant, Danels, "by protestation, not confessing or acknowledging all or any of the matters or things in the complainant's bill of complaint contained, to be true, in such manner and form as the same are therein and thereby alleged and set forth, and as to all relief prayed in and by the complainant's bill of complaint, and as to all the discovery thereby prayed, save and except so much thereof as prays this defendant may discover if any account has been settled, by this defendant, with the said Henry Taggart in his life-time, or with his
313 executors since * his death, doth plead in bar, and for plea says, that he this defendant, finally settled and adjusted with John C. King, executor of the estate of Henry Taggart, deceased, after the death of the said Taggart, an account in writing, and by said account the balance in writing due to this defendant by the estate of the said Henry Taggart on the 25th of October, 1823, was admitted to be \$38,341.16, which account is just and true to the best of this defendant's knowledge and belief."

issue, by a proper replication, the truth of the facts stated in the plea. But in either case the controversy would turn altogether upon the facts stated in the plea, if the plea is permitted to stand. It is the strict and technical character of these rules of pleading, and the danger of injustice often arising from them, which has given rise to the equitable discretion always exercised by the Court of Chancery in relation to pleas. In many cases where they are not overruled the Court will not permit them to have the full effect of a plea; and will in some cases save to the defendant the benefit of it at the hearing; and in others will order it to stand for an answer, as in the judgment of the Court may best subserve the purposes of justice." See *Equity Rules*, 1888, Rules 19-22.

The complainant "by protestation, not confessing all or any of the matters and things in the plea of the defendant John D. Daniels, contained, to be true in such manner and form as therein set forth and alleged, does demur to the said plea; and for causes of demurrer, among other causes of demurrer, shows that the said plea is not accompanied, as part thereof, by the account therein referred to; and further, that the said plea is no answer to, and does not undertake to, answer the fraud and combination alleged in the complainant's bill; and that the said plea in no respect answers or meets the charges of said bill, or precludes the relief therein sought, or bars the inquiry therein made. Wherefore, and for divers other good causes of demurrer appearing in said plea, this complainant does demur thereto, and he prays judgment of this honorable Court, whether he shall be compelled to make any farther and other reply to the said plea; and he humbly prays that the said Daniels may be compelled to answer over to the said bill of this complaint, &c."

The defendant, King, filed an answer to the bill.

BLAND, C. (December Term,) 1825. This case standing ready for the hearing on the demurrer to the plea of Daniels, the counsel on both sides were heard, and the proceedings were read and considered.

It appears from the allegations of the parties, (and here the Chancellor stated the substance of the bill as before,) to which Daniels pleads an account settled with King, as executor of Taggart, in bar; to which plea the complainant has demurred. The plea of Daniels is intended as a bar to the complainant's prayer, for an account and relief grounded on the three charges of his * bill.—First, that Daniels and King have taken, or converted to their own use, **314** the testator's undivided interest in the property of the firm of Taggart, Daniels and King. Secondly, that Daniels and King have taken, or applied to their own use, the testator's separate property; and thirdly, that some portions of the testator's property have been taken or applied by Daniels alone, to his individual use. If the demurrer to this plea be sustainable, as has been urged, on the ground, that the settled account thus pleaded, is not such a one as could, in any form, be pleaded in bar to this bill, it will relieve the Court from the necessity of noticing any thing else, that has been pressed upon its attention in the course of the argument.

A settled account, is an adjustment of the adverse pretensions and claims of two or more parties; or a mutual compromise and arrangement of their respective debits and credits. It is, in effect, an agreement between the parties; and operates reciprocally like all other contracts and agreements. The idea of a settled account, or of a contract or agreement, therefore, necessarily involves the notion of two parties, the one contracting, and the other contracted with; or of parties who mutually agree together in relation to a particular

subject. And this notion, as to two parties, also necessarily supposes each of them have not only a capacity to contract, but in almost every instance, a capacity to sue and be sued. But the capacities to contract and to sue, with which each adult citizen is endowed, in general is without limit, for the disposition and protection of his property and person against all others, may be, and are, in many instances, by the particular nature of the subject of the contract or suit, enlarged, modified or extinguished. And the general capacity of an individual to contract or to sue, may also be circumscribed or fettered by his representatives or official character, or by the peculiar relationship to others, in which he may be placed. These positions need no illustration.

Now as to the case before us; let it be supposed, that Taggart and King only, had constituted this firm or copartnership; in that case it must be admitted, that when, on the death of Taggart, the two characters of surviving partner and executor * devolving
315 upon King, and became united in himself, he could not contract or sue respecting the undivided interest of the testator Taggart; because King could not contract with or sue himself; and while he chose to act as executor, there would be no other party representing Taggart's interest to contract with or to sue. And therefore, if King, the executor and surviving partner, was the debtor of his testator, that debt, by operation of law, would become assets in his hands for the benefit of the creditors and representatives of the deceased; and, if he was, on the other hand, a creditor, he might retain out of the assets of the deceased the amount of his claim against all others. In such case, it seems to be quite clear, that King could not have the capacity, in any manner, to make such a settlement of accounts, of himself alone, of the partnership affairs of Taggart and King as would be pleadable in bar of a bill like this, brought by the administrator of Taggart against him for an account.

But, in this case, King is not the only surviving partner—there is another, Danels; and it is Danels who pleads the settled account with King as executor in bar. But the union of two interests in King, that of his own and his testator's, had deprived him of the capacity to make any binding settlement or agreement as to his testator's share in relation to his own. This alleged settlement then, if binding at all, or in any way, could only operate between King and Danels; but the whole partnership affair, as between Taggart and King would remain open, or unaffected by it. This plea avers and sets out the balance between Taggart and Danels. But in a partnership or joint trade, carried on by three or more persons, it is impossible to settle an account with some of the members of the partnership, so as to ascertain the balance due from any one to any other member of the concern; and more especially so, as in this case, where the partner as to whom the balance is to be ascertained is himself a creditor of the firm. Wherever a balance is spoken of as

the result of a settlement of partnership accounts, a partial estimate is never understood. It is the result of the adjustment of the whole and entire partnership concerns.

It is true that these three partners, Taggart, Danels and King, * as to their respective rights, might have made any special agreement, or settled in any manner they thought proper, either in person or by their agents duly authorized. But King as executor had only the general authority incident to his office, and this plea of Danels is not based upon any special agreement of any sort, but upon a general settlement of the entire partnership accounts, and sets forth a balance which could only be the result of such an entire settlement. In this case, however, no such settlement could have taken place in the manner alleged in the plea, with King as executor of Taggart; because King was incapable of settling or agreeing with himself as partner and executor, and consequently Taggart's interest in the alleged settlement could not have been represented and protected by any one capable of settling and contracting for his rights. For as to the testator's rights and his interest, it was as if a settlement had been made during his life-time between Danels and King, at which Taggart was not present, and of which he had no knowledge. So far then as this plea relates to a settled account of the partnership affairs of Taggart, Danels and King, it has no foundation and cannot be sustained. **316**

The bill charges that the testator's separate property was also applied to the joint use of Danels and King, and prays that they may account for that, likewise. As to the testator's separate personal estate, there can be no doubt that his executor, King, might have disposed of it in like manner as his testator might have done. And if King had wasted it in any way, he himself would have been chargeable with the *devastavit*; but the right of any one fairly acquired from him would be unimpeachable. If King, as executor, had settled an account with Danels as to any dealings which Danels had respecting the separate estate of the testator, such a settled account might have been pleaded in bar of a bill brought against him for an account of such dealings; because such a plea, in such a case, would be a fair and direct avoidance and defence to such a bill.

But this bill presents a case which is formally and substantially different. In equity, as well as at law, the plaintiff can only have relief, or recover according to the nature of his case; and the * *allegata* and *probata* must substantially correspond. The charge in this case is, that Danels and King jointly converted the property of the testator to their joint use and benefit. This charge cannot be sustained by proof that either of them separately converted it to his own separate use. They are charged as joint wrongdoers, who have derived a joint benefit and advantage from their wrong; and the proof, when produced, must be applicable to that charge, or it is foreign from the case. Now it certainly cannot be that **317**

joint wrong-doers, any more than joint agents, will be allowed to plead a stated account between themselves as a bar to a bill against them, for an account of the property so by them converted. In equity, those who have jointly taken and used the property of another are considered as his trustees or bailiffs, and as such are held accountable. This objection to this plea applies with equal force, and is an additional objection to it, so far as it relates to the undivided interest of the testator in the partnership funds, which the bill charges Danels and King with having taken and converted to their joint use.

As to the third charge, about which the bill calls for an account; that is, as to the property of the testator Taggart, which came into the hands of Danels, and was applied to his individual use. If there had been a settlement of accounts between King as executor of Taggart and Danels in relation to such property, and such settlement had been properly pleaded, it would have constituted a good and sufficient bar to this charge in this bill. But the plea under consideration is not such a one. It is a plea in bar of all the relief, and all the discovery prayed by the bill, founded on a settlement of accounts between Danels and King as executor of Taggart, comprehending all the subjects set forth in the bill; and it avers a balance to be due from Taggart's estate unto Danels as the result of that general, comprehensive settlement of accounts. In pleading an account stated, as a bar, it is essentially necessary to set forth the particular balance found to be due. But if, as in this case, it appears, that the balance thus set out, and which it is essentially necessary should be averred

318 to constitute a good plea of an * account stated, is deducible from a statement, and is the result of a settlement, the greater part of which was of no avail, or was improper, it follows, that such plea must be considered as substantially defective in one of its most essential parts. It is as substantially deficient as it would have been if it had been wholly silent as to the balance ascertained to be due, since a specification of a balance derived from a source manifestly vicious, is as no statement of any balance whatever.

Upon the whole, it is considered that this plea is bad; first, because King, being himself executor and surviving partner, could not, and had not the capacity to make such a settlement with Danels of the partnership affairs of Taggart, Danels and King, as Danels might plead in bar of this bill; secondly, this plea is bad, because the bill charges Danels and King with having jointly converted to their own joint use, as well the undivided partnership property as the separate property of the testator, and to such a charge, a settlement between Danels and King can be no bar; and thirdly, this plea is bad as to so much as relates to property of the testator alleged to have been converted by Danels to his individual use; because, the balance set out in the plea is shown, by the general reference to the whole bill, to be the result, not merely of an account of such property, but of

that inclusive of all the other transactions stated in the bill, respecting which, an account between Danels and King could be of no avail against the complainant. Decreed, that the plea of the said Danels be, and the same is hereby overruled; that the demurrer be sustained; and that the said Danels do make a full and sufficient answer to the complainant's bill of complaint, and the matters therein charged.

From this decree Danels appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER and DORSEY, JJ.

Winchester. for the appellant. The bill of complaint in this case is simply a bill calling for an account, and being so, the plea of an account stated is a flat bar. The plea is in proper form, and is a proper answer to such a bill. *Mitf. Plead.* 210, *211. The bill does not charge fraud, nor allege any account stated, nor fraud in stating any account. The plea is, therefore, a proper answer to the bill. *Cooper's Plead.* 279; 1 *Madd. Ch.* 81, (83.) Fraud cannot be proved, unless it is alleged in the bill. *Wesly vs. Thomas*, 6 *H. & J.* 28. A surviving partner may be executor to his deceased copartner, as well as a debtor or creditor be executor to his creditor or debtor, and as such settle all the affairs of the partnership. *Burden vs. Burden*, 1 *Ves. & Beames*, 170. 319

Mayer and Taney, (Attorney-General,) for the appellee. The doctrines of a plea of an account stated; and whether or not the plea here pleaded is applicable to such a case as this, are fully commented upon and laid down in *Cooper's Plead.* 277, 279, 252, 225, 228, 229, 282, 283; *Mitf. Plead.* 208, 209, 211, 236; *Beames Pl. Eq.* 229, 226, 237; *Taylor vs. Haylin*, 2 *Bro. Ch. Rep.* 310; *Vernon vs. Vawdry*, 2 *Atk.* 119; *Drew vs. Power*, 1 *Sch. & Lef.* 182, 192; *Kinsman vs. Barker*, 14 *Ves.* 579; *Newman vs. Payne*, 2 *Ves. Jr.* 200; *Middleditch vs. Sharland*, 5 *Ves.* 87; *Beaumont vs. Baultbee*, *Ib.* 485; *S. C.* 7 *Ves.* 599; *S. C.* 11 *Ves.* 358; *Lady Ormond vs. Auchinson*, 13 *Ves.* 47; *Chambers vs. Goldwin*, 5 *Ves.* 835; *S. C.* 9 *Ves.* 265; *Roberts vs. Kuffin*, 2 *Atk.* 112; *Roche vs. Morgell*, 2 *Sch. & Lef.* 725, 727, 728; *Bayley vs. Adams*, 6 *Ves.* 586, 596; *Goodrich vs. Pendleton*, 3 *Johns. Ch. Rep.* 384; *Haickey vs. Simpson*, 3 *Atk.* 303.

Where the party is not presumed to have a counterpart of the account, it must be produced with the plea of an account stated. Here, it could not be presumed, that the complainant had any knowledge of the settled account. *Willis vs. Jernegan*, 2 *Atk.* 252. The plea should be signed. *Hodder vs. Watts*, 4 *Price*, 18; *Beames Plead.* 236, (*note a.*) It should deny all badges of fraud. *Goodrich vs. Pendleton*, 3 *Johns. Ch. Rep.* 384. A charge amounting to fraud is a charge of fraud. A charge of bad faith, is a charge of fraud; and the plea should deny the charge, and all the circumstances amounting to fraud. *Beames Plead.* 34, 35, 236, 237. It is not stated in the plea,

when or where the account was settled. The executor of a deceased
320 * copartner, might by conniving with a surviving copartner, so settle the accounts of the partnership, as to bring the deceased partner indebted to the firm, and by that means sink the whole estate of the deceased partner, and divide the profits between themselves. Whether or not any such object was in view, in this case, is of no sort of consequence. The act is not sanctioned by principle.

Wirt, in reply. The only question in this case arises on the pleadings. Upon the coming in of the plea, the complainant should have amended his bill. No injury could arise from this mode of proceeding. That which is asked by the bill is for discovery and relief. If the plea is a bar to relief it is also a bar for a discovery, *Cooper's Plead.* 291. Is the matter pleaded a bar to the relief? A surviving partner may act as executor of his deceased partner. This is not denied; and if he can, why can he not settle the partnership concerns, and do what the deceased might have done? No settlement which the executor might make could benefit himself. He was always liable to be called on by a future administrator or the representatives of his intestate. While King was the executor of Taggart he was competent to give a discharge to any debtor, &c. No fraud is charged in the bill so as to affect the plea. The fraud to affect the plea must charge fraud in the settlement and the stated account. There is no more charged in this bill, than there is in all ordinary bills against the fairest characters in the community. If it is a bill for an account, then is the plea, an answer and bar to the account asked for. *Mitford*, 210, 211. The bill states that there had been no account settled, and calls for one. The plea in answer says that there was an account stated, &c. If the bill had charged an account settled by fraud, &c. then the plea must have denied the fraud, &c. *Drew vs. Power*, 1 Sch. & Lef. 192; *Cooper's Plead.* 279. But here no fraud or error has been alleged to have taken place in the account stated. The plea is full to all essential parts. Why did not the complainant take issue on it, and put the defendant to his proof? The complainant might in a variety of ways have called
321 for the account. But it is said that the plea must * be good in whole; and that if it is bad in part, the whole is vitiated. *Mitford Plead.* 243; *Cooper's Plead.* 230.

DORSEY, J. delivered the opinion of the Court.—To the plea of an account stated, filed by the appellant, various causes of demurrer; both general and special, were assigned by the appellee; and upon hearing, the plea was overruled by the Chancellor. To test the correctness of that decision the present appeal hath been prosecuted.

A preliminary question, however, presents itself for the consideration of this Court, viz: is the decree or order, passed by the Chancellor in this case, of such a character, as to vest in the appellant an immediate right of appeal. That it does not, we think manifest,

on reference to the principles established in the cases of *Snowden et al. vs. Dorsey et al.* 6 H. & J. 114, and *Thompson vs. McKim*, 6 H. & J. 302, and *Williamson vs. Carnan et al.* 1 G. & J. 184, and *Hagthorp et al. vs. Neale, Adm'r of Hook*, 1 G. & J. 270. It decides a mere question of pleading; it settles no right between the parties. "If the plea is overruled, the defendant may insist on the same matter by way of answer." *Mitf. Plead.* 248. The only conclusive effect of the decision then is, that it drives the party to the necessity of asserting the same defence in a different form of proceeding; the consequence of which is, that he is subjected to the expense of producing his testimony to substantiate the allegations, relied on as his discharge. The same expenditure, he must have incurred, had issue been taken on the plea; and for this expenditure, in contemplation of law, he is indemnified by way of costs, if successful on the trial. It is not a decretal order, which in the language of the Court, in *Thompson vs. McKim*, "decides and settles the question of right between the parties," or, in that of *Williamson vs. Carnan et al.* which "so materially affects the rights and interest of the party, as to bring the case within the principle of *Thompson vs. McKim*;" but it is simply a decision, on a question of pleading, which leaves the whole matter in controversy open for future adjudication.

* Waiving, however, the objection to the regularity of the appeal: the overruling of the plea meets our entire concurrence. **322**
It is wanting in form and defective in substance: it contains not even the common conclusion, repeating the matters relied on in bar of the suit and praying judgment of the Court, whether the defendant ought to be compelled to make any further or other answer to the bill. The plea states, in bar of the relief and discovery prayed for, "that the defendant finally settled and adjusted with John C. King, executor of the estate of Henry Taggart, deceased, after the death of said Taggart, an account in writing; and by said account, the balance, in writing due to this defendant by the estate of said Henry Taggart, on the 25th day of October, in the year 1823, was admitted to be \$38,341.16½." The particular time or place, when the alleged settlement took place, is not stated, and, for aught that is contained in the plea, it might have been made in the State of Maryland, after the granting of letters of administration to the appellee, and even after the commencement of this suit. But suppose it be conceded that the time of accounting was on the 25th of October, 1823, will this cure all objection to the plea as regards time? unquestionably not. The bill charges the defendant with having collected (but says not when) after the death of Henry Taggart, a large amount or the whole of the debts, due to the firm of Henry Taggart & Co. amounting to \$52,383.33; with having applied part of the personal property of Henry Taggart, enumerated in exhibits D and E, as of the value of \$3,260, to the payment of Henry Taggart & Co's debts; but says not at what time the application was made. The bill also charges

that Henry Taggart, at his death, was sole owner of schooners Centillo, Daphne and Cleopatra, and one-third of schooner Leano, and held a large interest in the brig El Presidente. That all of said vessels were taken possession of and sold for the sum of \$16,800; and the proceeds of sale applied to the defendants' own use; but when the sales were made, and the proceeds received is not stated. That the Brig Aquila, owned by Henry Taggart, on her cruise between February and October, 1823, made many prizes, which were condemned * and sold; and the proceeds, amounting to upwards

323 of \$10,000, received by the defendants and applied to their own use, but when received is not alleged. That in a subsequent cruise she made captures, the proceeds of which were received by Danels, and amounted to upwards of \$30,000; and subsequently made prizes of great value, which were received in like manner. That Henry Taggart, at his death, owned one-half of the brig El Vencedor, the earnings of which, received by the defendant, Danels, had been \$64,000, but when received does not appear. That individual debts, due Henry Taggart, at his death were collected by the defendants, and appropriated to their own use, to the amount of \$57,440; of the time of receipt nothing is said. Admitting then, what the plea does not distinctly aver, (but what is indispensable to its validity) the time when the account was stated, the Chancellor could not have done otherwise than overrule the plea. It covers not the case set forth in the bill; every word of it may be true, and yet according to the allegations of the complainant, the defendant may have received, subsequently to the time of adjusting the account stated, and be now bound to account for, all the items hereinbefore enumerated, amounting to the sum of \$234,483.33. It is therefore no bar to the discovery and relief sought for. The plea, of an account stated, to such a bill as the present, cannot be sustained unless it be supported by an answer denying the receipt of any part of the money for which he is called upon to account, subsequently to the time when the account stated was adjusted. But relieved from this objection the plea is yet void for uncertainty. It alleges that the defendant Danels, settled and adjusted with John C. King, executor of Henry Taggart, "an account in writing;" but what transactions it embraced; whether it related to all or any of the subject-matters, now in controversy, we are furnished not with even the means of conjecture. For aught that appears it may have been an account settled between the parties of the partnership concerns of Taggart and Danels, anterior to the admission of John C. King into the firm; or it may have been a settlement of transactions wholly unconnected with all or any of the

claims of * which the defendants are now called on to answer.

324 Upon such a plea the plaintiff could not have taken issue. By doing so he would have admitted the sufficiency of the plea as a bar, if the facts which it asserted were established by proof. And if on such an issue the account stated had been proved, although it

might relate to matters wholly foreign to those now in controversy the bar would have been complete and the bill must have been dismissed.

“In pleading, (says *Mitf. Plead.* 237,) there must be the same strictness in equity, as at law; at least in matter of substance.” “A plea must follow the bill and not evade it.” *Mitf. Plead.* 237. “All the facts necessary to render the plea a complete equitable bar to the case made by the bill, so far as the plea extends, that the plaintiff may take issue upon it, must be clearly and distinctly averred.” *Mitf. Plead.* 240. The same doctrine is found in *Harr. Ch.* 229, and *Cooper’s Plead.* 228. Apply these principles to the plea before us, and all doubt of its insufficiency must instantly vanish. Its defects are equally obvious, by comparing it with the precedent of a plea, of an account stated to be found in *Harr. Ch.* 618.

The plea, professes to be a bar to all the relief and discovery called for by the bill, a part of which refers to specific property of the late Henry Taggart, now in the possession and user of the defendant Danels, to such part of the complainant’s prayer, the plea of an account stated, cannot be urged as a bar.

Appeal dismissed with costs.

COALE *et ux.* vs. BARNEY *et ux.*—December, 1829.

Upon a merely equitable estate, no writ of partition can be maintained at law.

A failure to comply with an engagement to do a mere nugatory act, ought not to impair the rights of a complainant in equity to relief. when the facts of his case, otherwise concur, to sustain his bill.

An agreement was entered into, on the 27th November, 1818, between the *cestui que trusts* for life, and remainder in fee. and the trustee, of a certain trust estate, held by the latter in fee, the object of which was to lease out * the trust property then unimproved, and secure to the the *cestui que trusts* in remainder, an immediate participation in **325** the rents. For that purpose it was agreed, that the trustee should appoint an agent, to make leases for ninety-nine years, with liberty of renewal, for such rents as should be thought reasonable by the parties interested, payable annually during the terms, to the agent in trust as follows:—viz. one-half to one *c. q. t.* in remainder, during her life; and after her death, to her children, their executors and administrators; one-fourth to another *c. q. t.* in remainder for life, with a similar reservation to her children, &c.; the other fourth to the *c. q. t.* for life, during her life, and after her death to the last above mentioned *c. q. t.* in remainder, her executors and administrators. On the 29th September, 1823, a bill was filed by two of the *c. q. t.* against the third, for a specific execution of the agreement, upon the ground that the defendant, since the year 1818, had prevented the execution of the leases, and refused to do any act, towards carrying the contract into effect. This charge being established, and it appearing that the parties were near relations, and that

the complainants had made frequent efforts for an amicable arrangement, it was *held*, that there was an adequate consideration to support this agreement, for the violation of which damages to the full extent of the injury sustained, might be recovered; that the complainants had not slept upon their rights in such a way, as to shew the contract had been abandoned; that Chancery has power to grant adequate relief, which could only be done by providing the means, necessary to carry into effect the leading object of the parties, the leasing the property at reasonable rents; and that in doing this, it was the duty of the Court, to gratify the minor provisions of the agreement, so far as it could be done consistently, with the accomplishment of the grand design.

The defendant, in this case, was deemed to have forfeited the right of fixing the reasonableness of the rents, to be reserved in the leases referred to in the preceding contract, by shewing her determination to act in such a way, as to render her exercise of that right wholly inconsistent with the relief due to the complainants, and her right was therefore transferred to a trustee appointed for the purpose of executing the agreement; which trustee was enjoined to execute leases, for such rents, as he, together with the complainants, should think reasonable.

Where an agreement contains provisions, which, by reason of some technical principle of law, cannot be carried into effect, according to its literal import, it is the duty of a Court of equity, for the sake of the intent, to give it that construction which the rules of law will tolerate: and the intention of the parties, to be collected from the whole instrument, will justify.

So the interests of the *cestui que trusts*, in remainder, in the property referred to in the preceding agreement being real, and not personal estate, and as such, could not be limited to their executors and administrators. The Court decreed the rent to be paid to the *c. q. t.* and their heirs, and this as to all the parties entitled to such rents.

326 * APPEAL from the Court of Chancery. The bill, which was filed on the 29th of September, 1823, by the appellees against the appellants, and Hannah Kitty Chase, stated that John Eager Howard, by his deed of conveyance, bearing date the 28th February, 1793, did convey to William Paca, a certain lot of ground, situate in the City of Baltimore, upon the terms and conditions of the Exhibit A, hereinafter set forth. That after the execution of the said deed, and in the life-time of Samuel Chase, his daughter Eliza Chase intermarried with George Dugan, and Mary Chase, the female complainant, intermarried with William B. Barney, the other complainant. After which, Samuel Chase died, and on the 2d of October, 1813, George Dugan died intestate, and without issue of the body of his wife Eliza. That Eliza, his widow, acquired in her right as his wife, a large amount of property, which placed her in very comfortable, if not affluent, circumstances. That Mary, the female complainant, having several children, and being in straitened circumstances, owing to the misfortunes of her husband in commerce, the said Eliza and Hannah Kitty Chase, the mother of Eliza and Mary, being desirous of bringing the said property into immediate action and use, and for the benefit of all parties interested in the

same, which would otherwise have remained useless, both to Eliza and Mary, during the life of their mother, did, together with John P. Paca, the son and heir of William Paca, and to whom the trust aforesaid had descended by the death of his father, and with the complainants, execute an instrument of writing, whereby they agreed and covenanted to and with each other respectively, according to the terms of the Exhibit B, hereinafter set forth, a copy of which was filed with the bill, and the original of which was to be produced when required. That Eliza Dugan, about the 29th of January, 1818, intermarried with Skipwith H. Cole, and she has since wholly refused to do any act whatever, towards carrying into effect, the agreement and covenant aforesaid, and hath actually notified John P. Paca, and all the other parties interested, that she will never consent that the same shall be carried into effect. That in consequence of such, her refusal to comply with her said agreement, such * persons as are desirous of taking leases upon the said lot of ground, have **327** been and still are deterred from doing so; and John P. Paca being but a trustee, and knowing that Eliza is in justice and equity bound to fulfil her agreement and covenant, is yet unwilling to incur the hazard which he apprehends from executing the power of attorney aforesaid. That by the bad faith and refusal of Eliza, the complainants are greatly damnified, and scarce possess the means of providing for the subsistence, much less for the education of the children of Mary. That she and her sister Eliza were educated and entered life together, and Eliza, at the time of executing the said contract, and until her last intermarriage was altogether childless; while Mary, who is the youngest sister, was the mother of several children, and hath since had several others, for whose maintenance and education, tenderness and duty alike have always heretofore, and now doubly prompt her to provide. The bill had a general interrogatory, and also a special one as to Eliza's conduct, and whether she did not execute the aforesaid agreement in manner and form, and under the circumstances aforesaid, and prays that Eliza may be compelled to do all such acts in the law as may be necessary specifically to put into execution her contract or agreement aforesaid, according to its true intent and meaning, &c. The bill also prays for all relief proper in the premises.

The Exhibit A, is a deed from John Eager Howard to William Paca, dated the 28th of February, 1793, whereby in consideration of the sum of five shillings, the said Howard conveyed to the said Paca, his heirs and assigns forever, all that part of a parcel of a tract of land called Lunn's Lot, beginning for the said part at, &c. containing 2 1-8 acres of land. To have and to hold the following part of the said parcel of land beginning, &c. containing one-half acre and one-thirty-second part of an acre of land, unto the said Paca, his heirs and assigns forever, in trust to and for the uses, &c. that is to say: In trust for the use and behoof of Samuel Chase and Hannah Kitty Chase, (wife of the

said Samuel Chase,) for **and** during their joint natural lives, and the life of the survivor of **them**; and after the death of the said Samuel **328** * and Hannah Kitty, to have and to hold one undivided moiety or half part of **the** said land and premises, in trust for the use and behoof of Eliza Chase, daughter of the said Samuel and Hannah Kitty, and the heirs of the body of the said Eliza Chase, and to have and to hold **the** other undivided moiety or half part of the said land and premises, in trust for the use and behoof of Mary Chase, daughter of the said Samuel and Hannah Kitty, and the heirs of the body of the said Mary Chase; and in case of the death of either Eliza or Mary without issue, cross-remainders between them in tail, and with remainders over to Samuel and Thomas Chase (sons of the first mentioned Samuel,) in distinct halves in tail, with cross-remainders in tail **between** them; and with final remainders to Ann Chase (daughter of **the** said Samuel) as to one-half, and to her heirs in fee simple; **and**, as to the other half, to Matilda Ridgely (another daughter of **the** said Samuel) in like manner. To have and to hold all the residue **of** the said part of the parcel of land, first above mentioned and described unto the said Paca, his heirs and assigns forever, in trust **to** **and** for the several and same uses, intents and purposes before mentioned, of and concerning the part of **the** said parcel of land last above mentioned; and on the further trusts &c.

The Exhibit B, is an agreement entered into on the 27th of November, 1813, between John P. Paca, Hannah Kitty Chase, Eliza Dugan, William B. Barney and Mary his wife, reciting that "John P. Paca is at this time seized in fee simple, in trust for the said Hannah Kitty Chase, Eliza Dugan and Mary Barney, of and in a certain piece or parcel of ground, in the City of Baltimore, fronting on **329** ington street, the breadth of 175 feet, and on Eutaw street 186 feet, and binding westwardly on Walsh's alley, and on the south with an alley called Chase's alley, which piece or parcel of ground is at present unimproved. And whereas, it is thought by the parties interested, that it would be for their mutual benefit, that the said property should be divided into lots, and demised for ninety-nine years with liberty of renewal, for such rents as may be thought reasonable by the parties interested, to be reserved by the said leases, annually during the said terms. And * whereas, by reason of the distance of the said John P. Paca's residence from the city, it would be inconvenient for him to execute the said leases, to attend to the collection of the said rents, now, therefore articles witnesseth, that the above mentioned John P. Paca, Hannah Kitty Chase, Eliza Dugan and William B. Barney and Mary his wife, have mutually and separately for themselves, their heirs, administrators, agreed and covenanted, to and with each and every of them, respectively, and to and with their respective executors and administrators, that the said John P. Paca shall, and will, by a good

nt power of attorney, by him duly executed, constitute and ap-
t Cumberland Dugan, of the City of Baltimore, his attorney, for
purpose of executing such leases, and giving thereby full power
authority so to do. In which leases, the rents shall be reserved to
aid to the said Cumberland Dugan, his executors or administra-
in trust for the said Hannah Kitty Chase, Eliza Dugan and
Barney, in the following proportions : In trust as to one-half of
uch rents to be paid to the said Mary Barney's sole and separate
during her life, annually, to her, and after her death to be paid
er children, their executors or administrators, in equal shares;
discharged during her life-time, by her receipt," &c. "And as to
ourth part of the said rent, in trust to be paid to the said Eliza
an, her executors and administrators. And as to the other
h part, in trust to be paid to the said Hannah Kitty Chase, dur-
er life, and after her death, to the said Eliza Dugan, her execu-
' &c. Signed and sealed by all the said parties.

e only answers material, were those of Coale and wife. They
ered separately. Coale answers as to his hearsay and belief,
Mrs. Chase had not performed the consideration, on which the
agreement was founded,—that of barring the entail of the said
parcel of ground, by uniting in a conveyance; that she had
leases of the ground in question; that Barney and wife had
gaged their estate in it, and that the agreement had been aban-
l. Mrs. Coale in her answer alleges, that her mother agreed,
ow refuses to unite with the other persons * having the
nder in tail, to bar the entail, which was the consid- **330**
n of the agreement of leasing. That the agreement, except upon
onsideration, was without inducement or consideration at all.
she had notified her opposition to the leases of the property,
se her mother had violated the understanding on which the
nent was entered into. That she has children now, and that
ferred to let the agreement be executed, if she should be
d one-half of the three-fourths of the rents.

complainants' and defendants' counsel on these answers coming
lered the register "to file the general replication," and to issue
mission to a person named by them. An agreement was en-
into, to set the cause down for hearing at December Term,
with liberty to either party to examine witnesses under a com-
n.

ND, C. (December Term, 1825.) It appears from the proceed-
that the articles of agreement mentioned in the bill of com-
bearing date on the 27th of November, 1813, ought to be spe-
y performed and executed, according to the true intent and
ing thereof, as prayed.—Decreed, that Cumberland Dugan be,
is hereby constituted and appointed a trustee for the purpose
cuting and performing the said agreement; and the said trus-

tee, shall immediately proceed to make such a lease or leases, of the piece or parcel of ground described in the said article of agreement, in such manner and upon such terms as he shall deem most advantageous and beneficial to all the parties concerned and interested in the same. In which lease or leases the rents shall be reserved, and made payable unto the said trustee, his heirs and assigns, in trust for the said Hannah Kitty Chase, Eliza Coale, and Mary Barney in the following manner, to wit: In trust, as to one-half of all such rents, to be paid to the said Mary Barney's sole and separate use, during her life, annually to her, and after her death to be paid to her children, their executors or administrators, in equal shares; to be discharged during her life-time by her receipt, &c. And as to one-

331 * fourth of the said rent, in trust, to be paid to the said Eliza Coale, her executors and administrators. And as to the other fourth part, in trust, to be paid to the said Hannah Kitty Chase during her life, and after her death to the said Eliza Coale, her executors, &c. Decreed also, that Coale and wife pay all the costs of this suit. From this decree, Coale and wife appealed to this Court.

The cause was argued before EARLE, MARTIN, and DORSEY, JJ. *Mayer*, for the appellants, insisted. 1. That the agreement for leasing the property was inoperative, and could not be regarded by a Court of equity. 2. That the bill, answers and proceedings do not present a case fit for the cognizance or specific interposition of Chancery. 3. That it was the duty of the complainants to allege the equitable merits of their claim—leaving no doubt of those merits. 4. That the bill shows no equitable right; and the answers of the appellants rebut all pretensions of the bill. 5. That upon the bill, answers and proceedings the decree was erroneous.

1. The answer of the defendant, Mrs. Coale, is strictly responsive to the bill; and although there is a general replication, and no testimony taken, yet it was incumbent on the complainants to prove their case. The case must be considered on the bill and answers. The complainants must satisfy the Court that the agreement to be enforced is liable to no suspicion, and equitably fit to be carried into effect. 2 *Pow. on Cont.* 222; *Seymour vs. Delancey*, 6 *John. Ch.* 222; 1 *Madd. Chan.* 321. 2. The agreement cannot be enforced. It depended on the discretion of Mrs. Coale whether she would carry it into effect. Equity can have no cognizance of it. The agreement gave Paca no more authority than he before possessed. He had no power to lease. For the non-fulfilment of the agreement none but nominal damages were sustained. Voluntary covenants are not to be enforced in equity. 1 *Madd. Chan.* 321, 327, 328; *Minturn vs. Seymour*, 4 *Johns. Ch.* 497. Nor * in any case where none but

332 nominal damages can be recovered at law. 1 *Madd. Chan.* 288, 321, 328; *Stapilton vs. Stapilton*, 1 *Atk.* 10. Here only nominal damages would be recovered for refusing to permit Dugan to be ap-

ted an attorney to make the leases. It was only a covenant for delegation of a power. How could a decree be made to enforce agreement? It is true, the Chancellor has passed one, constituting Dugan the attorney to execute the leases; but it is wholly inoperative. Mrs. Barney is one of the complainants. She makes no concession, and has no right to call for the execution of the agreement.

But there has been laches fatal to the complainants' case. The agreement was entered into in 1813, and the bill was filed in 1822. Specific performance will, therefore, be refused. 1 *Madd.* 239, 330; *Marquis of Hertford vs. Boore*, 5 *Ves.* 720, (note 6;) *et vs. Homfray*, *ib.* 818, 822.

There is no allegation in the bill that the property could be obtained upon advantageous terms.

The answer of Mrs. Coale is separate from that of her husband. Husband and wife must answer jointly. *Cooper's Plead.* 24, 30.

Winchester, for the appellees. The whole of what has been urged by the counsel of the appellants might be admitted as having nothing to do with the case before the Court. The defendants who resist this proceeding must sustain their case by proof in support of their answers. The answers are not responsive to the bill. The agreement is a common one to change the situation of the title to property. It is a contract for a valuable consideration. The interest in the property was in Mrs. Chase during her life; and she and her daughters, with a full knowledge of the subject, executed the agreement. There is no remedy for enforcing it, unless it can be enforced in equity. The Court of Chancery can enforce this contract. 1 *Madd. Ch.* 286. If the allegations in Mrs. Coale's answer are all proved, yet they have nothing to do with the claim set up by Mrs. Barney to have the agreement carried into effect. But there is no proof of any of the allegations in the answer of Mrs. Coale.

The agreement is admitted—there is no suspicion of improper execution. **333**

But it is urged that the complainants have sustained no damage, any, only nominal damages. Suppose at law it was proved that the property could have been leased for \$1,500 or \$2,000, but for the refusal of Mrs. Coale to execute the agreement, would Mrs. Barney be turned off with nominal damages? It is also alleged that there is no equity set forth in the bill. This is never done where it is a specific execution of a contract, as the contract is to speak for itself. The non-execution of a contract is shown by Mrs. Coale's answer, shewing that she prevented its execution. It is admitted that voluntary covenants or contracts are not enforced in equity; but it is denied that this is a voluntary contract within the meaning of 1 *Madd. Chan.* 321, 327.

It has been said that the complainants have been guilty of laches. This must depend upon all the circumstances of the case, and the conduct of the parties to each other. Here were sisters, who no

doubt, were not desirous of going to law. It is not similar to ordinary cases of persons wholly unconnected by relationship. It is not a contract of purchase and sale, but it is a family compact which all had a right to move. Forbearance, therefore, was a duty and it was meritorious. Mrs. Coale, in her answer, shows that the subject was constantly a source of correspondence between her and her sister, &c. and that a new agreement was at one time in agitation.

Taney, (Attorney-General,) and *Mayer*, in reply, cited *Co. Lit. a*; 2 *Roll. Ab.* 289, 450; *Dyer*, 45; 12 *Co.* 35; *Cro. Car.* 290; 2 *Con.* 221; 3 *Ves.* 420; 4 *Ves.* 480; 9 *Ves.* 608; *Hotham vs. East.* *Co. Doug.* 277; 1 *Newl. Cont. ch.* 19; *Pow. Cont.* 40; 2 *Powell*, 234, 17, 242, 252; 4 *Ves.* 849.

DORSEY, J. delivered the opinion of the Court. Against an decree for the specific execution of the agreement mentioned in the proceedings in this cause, many distinct and independent grounds have been relied on by the solicitors for the appellants. For it was contended that the refusal of Hannah Kitty Chase, as alleged in the answer of Eliza Coale, to perform her promise *of v

340 for the purpose of docking the estate tail; (which promise is said, was the main inducement with Eliza Coale to enter into the contract,) is sufficient to induce the Court to withhold that which it might otherwise have been disposed to grant. Withholding the question so warmly contested in the argument; and the answer, without further proof, can sustain a defence thus / on new, and, as it were, independent matter, (which it undoubtedly could not, unaided by the unsafe and unusually comprehensive interrogatory in the conclusion of the bill of complaint,) it is as to say that this ground of resistance is swept from the appeal by the decision of this Court in the case of *Newton et al. vs. G. al.* 1 *H. & G.* 111, which determines that estates tail, to the body generally, created after the first of January, 1788, are by the operation of the Act of Descents, converted into estates simple absolute. And this case cannot evade the rule established by the fact, that in *Newton and Griffith*, the question was the legal title to land; here the principle is to be applied to a mere equitable interest. In this respect equity must follow the law. The alleged promise of Hannah Kitty Chase to unite in docking the estate tail, was therefore an engagement to do a nugatory act; and to comply with which ought not to impair the rights of the appellees.

It can hardly be necessary to notice one of the objections, that a Court of Chancery cannot enforce the contract made by Eliza Coale, because it was wholly voluntary on her part, and she received no consideration for her agreement to lease. If there was "consideration" that the mother, a tenant for life, transferred

her interest to her daughter, in property to which the daughter was titled in remainder, to obtain the daughter's assent to such an improvement of the property as would (for aught that appears in the record) produce inconvenience or loss to no person interested, but is indispensable to any beneficial enjoyment of it by the mother, it is difficult to conceive, what, in such a case, would be required as an adequate consideration.

We are told by the appellants' solicitor, that the great appreciation in real property, and especially in the City of Baltimore, is a matter of public history, of which the Court must judicially take notice, and that, although a regard to her own interest, might prompt Eliza Coale to agree to lease in 1813: yet the state of things is now entirely changed, and to enforce the agreement at this time, would be subjecting her to great hardship and loss. The condition of this country, in 1813, and a few years afterwards, was an accidental and unnatural one; the like may not again occur for centuries, and it is a matter of sheer speculation and great doubt, whether the interest of all concerned would not be promoted by an immediate leasing of the property. But if there be hardship and loss in the case, to whom is it to be imputed? To Eliza Coale, whose refusal to perform her agreement, prevented the execution of leases, when rents had reached their most unreasonable height. Had she not thus refused, from that transfer by her mother, which is now called "no consideration," she would have received in rents, up to this time, a sum of money, greater in amount, than the entire value of her present interest in the property: and, independently of this, as she has received, her interest in the property would now have been many times as valuable as it is. In this she is not the only sufferer. The consequences of this controversy are now visited, in a much more severe degree upon her sister, Mrs. Barney.

It was also urged, that by another rule of Chancery jurisdiction, the appellees were prevented from obtaining the interposition of a court of equity: viz. that where a party had a complete remedy at law (as might here be had by a writ *de partitione facienda*;) or where legal damages only could be recovered at law, a specific execution of the contract will never be decreed. In answer to this it may be replied, that the rule referred to has no application to the case before the Court. It does not appear that the lot of ground is susceptible of a division into moieties; and if it were, even if no life estate intervened, the estate of the appellees being merely equitable, no writ of partition could be sustained at law. That if it could, the condition of the parties, under such a proceeding, would be different. What would be under the agreement. If partition were made at law, 'tis true, that Barney and wife, with Hannah Kitty Chase, might (as is stated) lease a moiety of the ground, for ninety-nine years, renewable forever, reserving the rent to Mary Barney, and her heirs; but, *non constat*, that she would be willing to do so. She

might with convenience assent to giving her daughters three-fourths of the rents, reserving her life estate in the remaining fourth: yet it by no means follows, that she could conveniently bestow upon one daughter the entire rents of one-half of the property; whilst the other half, in its unimproved condition, continued on her hands destitute of value. That so far from nominal damages only, being recoverable, for such a violation of contract, damages to the full extent of the injury sustained by the appellees, would certainly be recovered.

Another ground more strongly relied upon against the appellees is, that they have slept upon their rights, in such a way as to shew that the contract was abandoned. And many cases have been referred to, between vendors and vendees of real estate, in which a Court of Chancery has denied all aid to those, who have not been vigilant and active in asserting their rights; or, in the language of some of the cases, who have not been always "ready, desirous, prompt and eager," to comply with their portion of the contract, and to enforce on the other party, a like compliance with its stipulations. A contract to lease, say they, is to all beneficial purposes a sale; its effects being the same. This position would not be denied, if this controversy were between a lessor and lessee; nor would the conclusiveness of the authorities cited be questioned, if this were a case between vendor and vendee. The justice, the policy of this rule is most obvious; the grossest frauds and injustice would be practised, if it did not prevail. But for this, stale contracts virtually abandoned, though not formally released; in case of a sudden rise or fall in the value of the thing contracted for, would be set up, and the party complainant would unfairly gain what the party defendant would unjustly lose; an amount precisely equal, to the appreciation * or depreciation which the property had undergone;

343 could that, in any event, be the predicament of the parties to this suit? Certainly not. As regards enhancement or diminution of price, their interests are homogeneous, inseparable; profit or loss can happen to neither, without a proportionate participation by both. Except in the class of cases adverted to, no authority has been produced to shew that for such laches and under such circumstances, as are before us, relief has been denied under the presumption of a waiver or abandonment of the contract. The delay of the appellees, in proceeding to assert their rights, is considerable; but it is satisfactorily accounted for, and the weight of the objection entirely fails when we reflect on the near relationship of the parties concerned, and look to the answer of Eliza Coale, and see what efforts were made to effect an amicable arrangement of the dispute, and that the door of negotiation is still open, and that this implied abandonment of contract is no where insisted on in the answer.

The answer does not state, nor has any proof been offered to shew, that the consummation of this agreement will work any particular

rdship upon the appellants, or subject them to loss, inconvenience sacrifice of any description. Why then, these appellants should sist in a course of conduct, by which they have already lost in its, more than the value of their whole interest in the property, is onceivable. The hardship of the case lies altogether on the other e. A large lot of ground, as is stated in the agreement, lying "in City of Baltimore" "unimproved:" owned by a mother for her , with remainder in moieties to her two daughters in fee, is kept a situation to be of no annual value to any of them, by the usal of one of the daughters to permit its improvement in the al and only practicable mode; when by complying with the omn contract into which she has entered, she would relieve the its of a needy sister and family, for whom she professes great ction and concern; and be herself invested with the immediate yment of one-half of that, to which she was only entitled in re- nder; and this too, without lessening her interest in her other ety.

The last ground, upon which a reversal of the decree was anded, was, that it was erroneous, inasmuch as it departed **344** n the sense and terms of the agreement, in investing Dugan, the trustee, with the privilege of judging of the reasonableness of the ; a privilege reserved to Eliza Coale, as one of the persons inte- ed.

hat this Court have the power to grant adequate relief, in a case the present, we have no doubt. Such relief can only be had, by riding the means necessary to carry into effect, the great leading ct of the parties; the leasing the property at reasonable rents: in doing this, it is our duty to gratify the minor provisions of agreement, as far as it can be done, consistently with the accom- iment of the grand design. To pass a decree, as is suggested, leases should be made at such rents as Eliza Coale should sanc- would be doing a nugatory act. She has, by her conduct in transaction, shewn a fixed determination that no leases shall ade, if she can prevent them: unless at a sacrifice, of the inte- of her mother and sister, which she is not warranted in demand-

She has therefore forfeited this right, by acting, and shewing a rmination to act, in such a way, as to render her exercise of it lly inconsistent with that relief, to which the clear equities of appellees entitle them. In transferring the power to another inal, the Court know of none more safe, none so convenient, as trustee by whom the leases are to be made and executed. So r of the Chancellor's decree therefore, as appoints Cumberland an, trustee for the purpose of executing and performing the ement, and gives costs to the appellees should be affirmed with : but the residue of said decree must be reversed, because the s are not decreed to be made for ninety-nine years with liberty enewal, as directed by said agreement: and upon a ground not

involving the gist of the controversy between the parties, and therefore, perhaps, not noticed in the argument: but which obviously appearing on the face of the decree, cannot be disregarded by this Court. One-fourth part of the rents received by the trustee, are directed to be paid to the said Eliza Coale, her executors **345** * and administrators; and in like manner, one other fourth after the death of the said Hannah Kitty Chase. The interest of Eliza Coale, in that portion of the rents, to her payable, under the deed from John E. Howard to William Paca, is real, not personal estate; and as such cannot be limited to her executors and administrators after the manner of personalty. Such a limitation is contrary to the rules of law, and by it nothing passes but a life estate to Eliza Coale: her executors or administrators take nothing. *Vide* 6 *Bac. Ab.* p. 21, tit. *Rent*, letter *H*. 'Tis true, the decree of the Chancellor has literally pursued the agreement; but where an agreement contains provisions, which, by reason of some technical principle of law, cannot be carried into effect according to its literal import, it is the duty of a Court of equity for the sake of the intent, to give it that construction which the rules of law will tolerate, and the intention of the parties to be collected from the whole instrument will justify. This will be effected, by ordering the rents to be paid to Eliza Coale and her heirs instead of executors and administrators. As authorities to shew that Courts of equity to gratify the intent, construe agreements even contrary to the words, we would refer to 1 *Brid. Ind.* 430, pl. 6-7, and to 5 *Ves.* 399; 1 *P. Wms.* 234.

Although the appellees do not appear before us seeking any revision or alteration of the decree; yet, as it is to be new-modeled to secure the rights of the appellants, such a change should be made in it as will do equal justice to both parties. Instead therefore of Mary Barney's moiety of the rents, after her death, being made payable to her children, their executors and administrators, as directed by the decree, it should be to her children and their heirs. And as the appellees have done nothing which could authorize a Court of Chancery to transfer to Cumberland Dugan the right, which by their agreement they have reserved to themselves, of deciding on the reasonableness of the rents reserved, the trustee should be enjoined to execute leases for such rents as he, together with William Barney and Mary his wife, and Hannah Kitty Chase should think reasonable.

A decree in conformity to these suggestions will be signed by the Court.

* UNION BANK OF MARYLAND *vs.* EDWARDS.—December, 1829. **346**

The rule, that a Court of equity will sometimes adopt a more liberal and enlarged construction than prevails at law, can never be tolerated, unless it be necessary to effectuate the motives which induced a contract.

Relief, by the doctrine of substitution, is never extended to a security, but upon the assumption that the creditor's debt has been, or is to be fully paid—that his further detention of the mortgaged property, is against equity and good conscience. (a)

So where a mortgage was executed, for the purpose of securing the payment of all and every sum or sums of money, then owing, or which might thereafter be due and owing, from the mortgagor to the mortgagee, upon any promissory note, or notes negotiated or to be negotiated with the mortgagee, of which the mortgagor might be drawer, or endorser, or otherwise however, and upon sale of the mortgaged premises, the proceeds being insufficient to pay a note of the mortgagor's to the mortgagee, for which the latter had no other security than the mortgage; it was *held*, that an accommodation endorser on a note of the mortgagors, discounted by the mortgagee after the execution of the mortgage and before the sale, could not call upon a Court of equity to distribute the fund above mentioned, rateably, in payment of both notes. (b)

APPEAL from the Court of Chancery. In this case a bill was filed on the 18th of December, 1822, by the appellants, against William Stansbury, for the sale of certain lots of ground in the City of Baltimore, mortgaged by him to them on the 27th of July, 1822, for the purpose of securing the payment of all and every sum or sums of money then owing, or which might thereafter be due or owing from Stansbury to the Union Bank upon any promissory note or notes negotiated, or to be negotiated at the said bank, which was or might be drawn or endorsed, or otherwise however; with a proviso, that if Stansbury should, when thereunto required, pay unto the said bank, all and every, the sum or sums of money then owing, or which might thereafter become due or owing from him to the said bank, either upon any promissory note or notes that had already been, or which might thereafter be negotiated at the said bank, of which he might be drawer, or endorser, or otherwise howsoever, then the said mortgage was to be void. Such proceedings were had upon the said bill, on coming in of the answer, admitting the facts stated in the bill, and consenting to a decree * for the sale of the mortgaged premises, and that out of the proceeds of sale, the sum of **347** \$20,000 due to the complainants, with interest thereon, should be paid; that at December Term, 1822, a sale was decreed; provided that not more than \$19,258 be paid to the complainants. The prop-

(a) Approved in *Lawson vs. Snyder*, 1 Md. 79.

(b) Examined in *Swan vs. Patterson*, 7 Md. 176.

erty was sold by the trustee, appointed for that purpose, to amount of \$12,005.33, and the sales were ratified.

On the 10th of December, 1824, and also on the 21st of February 1826, Elizabeth Edwards (the now appellee) filed her petitions. Her first petition stated, that in the year 1822, she had loaned her name for a small amount to William Stansbury, and had either drawn or endorsed notes for his use and accommodation accordingly, which notes had been and were discounted by the Union Bank. That subsequently thereto, Stansbury wishing to obtain further discount at said bank, and in order to secure the payment of all and every sum or sums of money then due, or which might thereafter become due and prevent any loss whatever on the notes so loaned or endorsed by her, or by other persons, or which might thereafter be loaned by him or others, and discounted at said bank, did on the 27th of July, 1824, execute a deed of conveyance by way of mortgage to the said bank, whereby he conveyed to them his real estate, or the greater part thereof, which was large, and consisted of a variety or number of lots and improvements, situate in the City of Baltimore. That the said property was intended and expressed in the said deed to be conveyed for the purpose of securing the payment of all and every sum or sums of money then due and owing, or which might thereafter become due or owing from Stansbury to the said bank upon any promissory note or notes negotiated, or to be negotiated at the said bank, of which Stansbury might be the drawer or the endorser. That the understanding and intention of all the parties, being, that the said property should be responsible for all notes negotiated or to be negotiated at the said bank for Stansbury, and the petitioner believing the said property to be valuable at the time, and sufficient to secure a large amount; and believing further, that in the event of a failure of Stansbury at any time to pay such notes, the said property would be sold, and the *petitioner and the other drawers and endorsers made responsible only for any deficiency (if any existed,) or that upon their paying such notes, the same could be assigned to them, she did not hesitate from time to time to renew the notes which she had drawn or endorsed for Stansbury before said deed was executed, and also draw and endorse other notes in his favor for his accommodation, which were discounted or continued at the said bank. The petition then stated the filing the bill by the bank and the sale of the property, &c. Prayer, that the proceeds of the sale may be applied to payment *pro rata* of the said notes held by the bank, and drawn and endorsed by Stansbury, &c. The last petition, after referring to the proceedings which had taken place in this case, stated, that the said mortgage from Stansbury to the complainants, was designed and intended by the parties thereto, to secure all the notes discounted and intended by the parties thereto, to Stansbury's use, or in the event of its falling short of the whole amount, then upon a sale becoming necessary, that the proceeds

should be applied rateably to the discharge of said notes. That the complainants now seek to apply the whole proceeds to the extinguishment of a particular debt, alleged by them to be due and owing to them from Stansbury; although the petitioner conceives the same is not embraced by the mortgage, and forms no part of the negotiated notes discounted for his use, and which alone were intended to be secured by the mortgage. Prayer, that the auditor be directed to state an account excluding the present alleged claim of the complainants, and distributing and applying the proceeds to the payment of the notes negotiated by Stansbury at the said bank, and there discounted for his use and accommodation; and another account whereby the same funds shall be distributed and applied rateably to the alleged claim of the complainants, and to the notes negotiated and discounted for Stansbury; and that the complainants produce to the auditor the several original promissory notes held by them and discounted for the use of Stansbury, &c.

To this petition the complainants answered, stating among other things, that in the year 1822, and previous thereto, * Stansbury was indebted to them to the amount of \$15,000 and up- **349**
wards upon certain promissory notes discounted by them for the use and benefit of Stansbury; and that on some of these notes made in the fall of the year 1822, the said Elizabeth Edwards' name appeared as drawer or endorser; that on the 27th of July, 1822, Stansbury executed the deed of mortgage, &c. That after the execution of the said mortgage, Stansbury continued to present paper whereon he was drawer or endorser for various amounts and at various times, with intent to have the same discounted for his use and benefit, which said paper was from time to time discounted, and portions thereof were also from time to time renewed by other notes. That these negotiations were continued until 1824, and in June and July of that year, Stansbury then stood indebted upon notes whereof he was drawer or endorser, viz. a note for \$8,700, drawn on the 17th June, 1824, by Stansbury in favor of J. P. Cashier, at sixty days. A note drawn on the 12th of July, 1824, by Stansbury in favor of Elizabeth Edwards for \$600, and endorsed by her, and Wilmer and Palmer. Three notes, the first dated the 8th of July, 1824, for \$1,800; the second dated the 14th June, for \$1,200, and the third dated the 19th of July for \$700. All three drawn by Elizabeth Edwards in favor of Stansbury, and by him endorsed; and Stansbury was also indebted to the said bank on two notes, the first drawn by N. M. Bosley in favor of Stansbury for \$300, dated the 17th of June, 1824, and the other drawn by J. Medtart in favor of Stansbury for \$200, dated the 17th of July, 1824, both of which notes were subsequently paid by their respective drawers; but the other notes before mentioned never were paid to the bank, and still remain due and unpaid. That soon after the execution of the deed of mortgage, the respondent filed their bill for the foreclosure thereof, the same hav-

ing become forfeit, and a decree by consent was accordingly obtained for a sale, &c. That the property was sold to the amount of \$12,005.33. That the said sum was answerable for the payment of certain liens there out, which were to be paid before any portion of the above mentioned notes were entitled to be liquidated; which said liens *consisted of, &c. which said liens thus reduced the
350 amount subject to the payment of the said notes to a sum less than \$8,000. That the sum thus left is not sufficient to pay the first note due by Stansbury for \$8,700. They utterly deny that there was any understanding or agreement between them and Elizabeth Edwards or Stansbury, that the mortgaged premises when sold should be applied to pay the notes whereof Mrs. Edwards was either drawer or endorser, or that any *pro rata* distribution of the fund should be made in her favor, or that there was any agreement or understanding between the said parties other than that recited in the said deed of mortgage. They aver that in granting the discounts as aforesaid to Stansbury they were regulated by their opinion of the solvency of Mrs. Edwards in determining whether they would grant discounts with her name; and took her name as a further and additional security for the payment of the notes by Stansbury, lest the security of the mortgaged premises should be, as it turned out to be insufficient for their indemnification against loss; and they would not have lent their money upon the security of Mrs. Edwards' name if they had been apprised that she could or would claim any benefit from the security of the mortgaged premises, as she now pretends to do by her petition. They are advised that Mrs. Edwards has no right in equity or in law to claim a payment of the notes where her name appears, until all the liabilities which were intended to be secured by the said mortgage be first satisfied. Prayer that the petition be dismissed, and the respondents be permitted to take the benefit from the mortgage as they are entitled in equity and conscience to demand.

Affidavits were filed by Mrs. Edwards; one of them, that of William Stansbury, who made oath that Mrs. Edwards became drawer or endorser on notes discounted at the Union Bank for the accommodation of the deponent, some time in August, 1822; that her name was substituted upon said notes for B. Middleton's, who was considered as in bad credit; and that Mrs. Edwards consented to lend her name on said notes under the express assurance that the payment of them was fully secured by the mortgage deed of a
351 amount of property to the *said bank, which he believed would have been amply sufficient to have secured the payment of all the notes at the said bank, had it not been disposed of as an immense sacrifice.

BLAND, C. (April 28, 1826.) The matter now presented for consideration of the Court, arises out of the petition of E

Edwards and the answer thereto of the bank. The counsel on both sides have been heard, and the proceedings considered.

It appears, that Stansbury, the defendant, with a view to obtain such loans of money as he might want, on the 27th of July, 1822, mortgaged the whole of a considerable proportion of his property to the Union Bank, the plaintiff; which, it was stipulated should stand as a security for all and every sum or sums of money then owing, or which might thereafter become due and owing from Stansbury to the bank, either upon any promissory note or notes, that had then been or might thereafter be negotiated at the bank, of which he might be drawer or endorser or otherwise howsoever. At the time this deed was made, Stansbury, it is alleged, was indebted to the bank to the amount of \$15,000 and upwards, by notes, of which he was either drawer or endorser; and some of which were endorsed by Elizabeth Edwards, the petitioner. After which, on the 18th of December, 1822, the bank filed their bill here to have the mortgage foreclosed; and on the 27th of the same month, by consent, obtained a decree for a sale; and a sale has been made accordingly. But notwithstanding this judicial proceeding, the negotiations between these parties were, from time to time, renewed and continued down to the month of July, 1824, when it appears, that Stansbury stood indebted to the bank to a considerable amount by promissory notes; one of which, dated on the 17th of June, 1824, for \$8,700, was given by Stansbury directly to the bank itself without any endorser; all the other notes were endorsed or drawn by other persons—the greater amount by Elizabeth Edwards, the petitioner.

The case is somewhat complex; but it appears to me, to be resolvable into this: The Union Bank is the creditor of Stansbury * to a considerable amount, for the payment of the whole of **352** which it holds a lien upon the mortgaged property, and for a part it holds the additional personal security of Edwards' endorsement of Stansbury's notes. This relationship of principal and debtor, and of a surety to a creditor who held a pledge of property as an additional security, existed, as relates to Edwards, on the execution of the mortgage deed, and has been, from time to time, revived, renewed, and continued ever since. I shall, therefore, consider these parties as now standing in this predicament and relation to each other.

The petitioner insists on having the proceeds of the mortgaged property, applied to the payment of the aggregate amount of debts due by Stansbury to the bank, as far as they will go, without distinction or discrimination. On the other hand, the bank contends for the right to apply those proceeds exclusively to the payment of Stansbury's note for \$8,700, on which they have no endorser or other personal surety than Stansbury himself.

The relationship of creditor, principal debtor, and surety, lays the creditor under certain obligations, which he is not allowed by either

allowed to come in for a distributive share of Edwards' assets. This marshaling of the assets and securities would be made only, at the instance, and for the benefit of Edwards' creditors; * yet her representatives might also receive material benefit. **354**

But, in this case it is a surety, not a creditor, who asks to have the burthen of this claim shifted over from one point of pressure to another. It is the surety who wishes the creditor to be directed to take his satisfaction from his principal debtor, so far as he can obtain it, before he is allowed to demand payment of the surety. It is believed, that a Court of equity has never, in any case, gone so far, at the instance of a surety, as to turn a creditor away from one fund, upon which, according to the express terms of the contract, he had a fair and an unquestionable claim; to seek payment from another, as he could, and which might, or might not, be made effectual. Nothing can be more delicate than the interference, either of the Legislature or of the Court of Chancery, taking away from those stipulated rights which the debtor has thought fit to grant. Such an arrangement, or marshaling of securities, it seems to me, would be pressing too closely upon that constitutional restriction, which forbids even our Legislature from impairing the obligation of contracts. The surety is the guarantee, and it is his business to see, whether the principal pays, and not that of the creditor.

But, where nothing is hazarded, and every thing may be attained which was contemplated by the parties, when they entered into the contract; in such case a Court of equity may fairly, and safely interpose; because, by doing so, it does not, in any sense, impair the obligation of the contract; but a new and equitable direction is given to it, for the prevention of wrong, and for the purpose of doing more ample justice to all. And, therefore, where it is shown, that the creditor has the clear means of making his demand effectual, and there is no risk, delay or expense; as when the money was in the next room, or an ample indemnification against the consequences of risk, delay and expense; the surety has a right to call upon the creditor to do the most he can for his benefit. As if the surety deposits the money, and agrees that the creditor shall be at no expense, he may compel the creditor to prove under a commission of bankruptcy, and give the benefit of the assignment to the surety * in that way. Other examples might be adduced equally strong to show, that a creditor may, under circumstances, be **355** called on to act for the benefit of the surety. In those cases, it is not by force of the contract; but of that equity upon which it is considered against conscience, that the holder of the securities should use them to the prejudice of the surety, where he himself can be exposed to no risk whatever.

Here it is clear, that the mortgage comprehends all the debts due by notes from Stansbury to the bank, as well those for which Edwards, as drawer or endorser, was surety, as all others. And it

is certain, that the bank can run no risk in doing what is now asked; because the proceeds of the mortgaged property, are now in the hands of the Court, or of the trustee, its officer, ready to be delivered over. To the extent of these proceeds, therefore, this creditor not only has the clear means, but the absolute certainty of rendering his demand effectual against his principal debtor. As the bank would not have been permitted to invalidate or enfeeble its mortgage to the prejudice of Edwards, so neither can they be allowed to chuse to trust Stansbury on his note and mortgage alone, and they should sustain any loss, they have only themselves to blame. It is enough for Edwards, and sufficiently maintains her equity, that the bank cannot lose any portion of the debt for which she is surety, by having that pledged property first applied towards its satisfaction, since it clearly formed a part of that aggregate amount of debt, intended to be secured by the mortgage.

Upon the whole, it is my opinion, that the proceeds of this mortgaged property, or so much thereof as may remain after all prior liens upon it have been fully paid, must be applied to the satisfaction of the total or aggregate amount of the sums of money due on notes by Stansbury to the bank; and that Edwards, as surety, is entitled to the equitable benefit of this application of these proceeds; and that she is liable to the bank for the balance and no more. As for example, if the bank should obtain from these proceeds only twenty-five cents in the dollar with interest, Edwards must be held liable for seventy-five cents in the dollar with interest, to the amount of which she was surety and no more.

356 Wherefore it is ordered, that this case be, and is hereby again referred to the auditor, with directions to state an account or accounts according to the principles that have been thus explained and determined.

The complainants afterwards on the 17th of July, 1826, petitioned the Chancellor for leave to amend their answer to the petition of Elizabeth Edwards for the purpose of introducing therein a variety of facts which were unknown to the Chancellor at the time of hearing, and that a re hearing may be had, &c. Accompanying the petition were several affidavits, with a list of the notes drawn said Edwards, &c.

BLAND, C. (July 19th, 1826,) after hearing the solicitors and petitioners on the foregoing petition, and considering the same together with the proceedings—Ordered, that the said petition be dismissed with costs. From which several orders in the case the complainants appealed to this Court.

The auditor afterwards, on the 1st of May, 1827, rendered his account, and thereby applied the net proceeds of the sale of the property to the payment of the trustee's commission, costs of suit, group

taxes, the prior mortgage to Richard Sommervill, and dividends on the amounts of the notes held by the bank.

The counsel of the parties entered into an agreement, after the appeal was depending in this Court, "that the affidavits filed by the appellee in support of her petition, and those filed by the appellants with the petition of the 17th of July, 1826, be received as evidence in the cause, as if the same had been duly taken before the hearing of the same. And also the auditor's last report, be confirmed by the Chancellor, and be admitted as part of the record in this cause, as if the same had been done before the appeal was entered; and that all other audits be dispensed with."

BLAND, C. (25th June, 1828.) On consideration of the agreement this day filed.—Ordered, that the statement of the * auditor be ratified and confirmed; and the trustee directed **357** to apply the proceeds accordingly, with a due proportion of interest that has been or may be received.

The cause was argued in part at June Term, and concluded at the present term, 1828, before BUCHANAN, C. J., ARCHER and DORSEY, JJ.

Kennedy, for the appellants. 1. Parol evidence is admissible to explain an equitable mortgage; also, that an absolute deed was intended as a mortgage. *Ex parte Langston*, 17 *Ves.* 227; 3 *Stark. Evid.* 1052.

2. Mrs. Edwards has assumed the privilege of a surety. She cannot stand as a surety. *Clopper vs. Union Bank*, 7 *H. & J.* 92. When the mortgage debt is paid, then the surety is to stand in the place of the creditor. Mrs. Edwards might come in for the surplus. *Hays vs. Ward*, 4 *Johns. Ch.* 123; *Cheeseborough vs. Millard*, 1 *Johns. Ch.* 409; *Stevens vs. Cooper*, *Ib.* 430; * *Wright vs. Simpson*, 6 *Ves.* 734; *Craythorne vs. Swinburne*, 14 *Ves.* 164. **358**

3. The notes of Mrs. Edwards, were not a substitute in the place of the notes drawn or endorsed by Middleton. If they were, such substitute could not have been for more than \$500.

4. He denies the want of due diligence on the part of the bank. There was no application made to the appellants by the surety to proceed against the principal. *Wright vs. Simpson*, 6 *Ves.* 734; *King vs. Baldwin*, 2 *Johns. Ch.* 554.

R. Johnson, for the appellee. 1. Assuming Mrs. Edwards to be a surety of Stansbury, and as such, that she would have been entitled to the benefit of the mortgage. Has she placed herself in a situation to claim the protection of this Court? The debt has not been paid; and the surety is entitled to the benefit of the pledge made for its payment to the creditor. *Hayes vs. Ward*, 4 *Johns. Ch.* 132. The proper time for applying to the Court of Chancery for apporportionment has arrived. *Ex parte Langston*, 17 *Ves.* 227.

2. Is not Mrs. Edwards to be considered as surety, and entitled to protection as such, though she was not known by the bank? *Clopper vs. Union Bank of Maryland*, 7 H. & J. 92; *Claythorn Swinburne*, 14 Ves. 170. The mortgage being of record, showed the world, that whatever note was drawn or endorsed by Stansbury came within the provisions of the mortgage.

3. Is not Mrs. Edwards entitled to be protected by the mortgage equally with the other endorsers of the notes of Stansbury? The mortgage was not to pay any particular note or debt then due to the bank; and in the answer of Stansbury to the bill filed against him for a foreclosure of the mortgaged premises, he stated that he owed the bank \$20,000. The decree by consent, was, however, to pay the complainants not exceeding \$19,258. This sum covered the whole amount of all the notes of Stansbury, including those drawn or endorsed by Mrs. Edwards. There is nothing in the mortgage to show that it was to secure the preferred debt of \$8,700, arising upon Stansbury's note to the bank, on which there was no endorsement. **359** and no parol evidence can be admitted to contradict the mortgage.

4. The agreement relative to the evidence taken after the decree was not intended that the whole of what was contained in the affidavits should be used as evidence; but only such as was legal and admissible. A great part of the facts proved, do not apply to the issue between the parties. *Hayward vs. Carroll*, 4 H. & J. 521; *Jones v. Slubey*, 5 H. & J. 382; *Westley vs. Thomas*, 6 H. & J. 24, 27. The evidence is that the mortgage was executed to secure a particular debt due at the time. In the answer to the appellee's petition in the case under the agreement, the bank prayed to amend it, which the Chancellor refused to grant. The evidence was inadmissible on the ground that it contradicted the mortgage. It changes the legal operation of a particular clause in the mortgage. *Westley vs. Thomas*, 6 H. & J. 27; *Watkins vs. Stockett*, 1b. 435. The mortgage was to secure all notes drawn or endorsed by Stansbury.

5. The evidence is sufficient to show that the notes drawn by Mrs. Edwards, were a substitute for the notes which had been drawn by Middleton in favor of Stansbury, and by him endorsed to the bank; and that the notes so drawn by Middleton, were in the bank at the time of the mortgage.

Williams, (District Attorney of U. S.) also for the appellee, cited *Ham. Dig.* 253; *Deraynes vs. Noble*, 1 Meriv. 608.

Taney, (Attorney-General,) in reply, referred to *Oxaythorne vs. Swinburne*, 14 Ves. 160; 4 Johns. Ch. 123, 124, 131; 2 1b. 554; 3 Stark. Ev. 1052, 1054.

R. Johnson, for appellee, in explanation of the rule as to the admissibility of parol evidence, cited *Union Bank vs. Betts*, 1 H. & G. 175.

* DORSEY, J. delivered the opinion of the Court. The rights of the parties in controversy in this cause, entirely de- **363**
 pended upon the true construction of the mortgage from William Stansbury to the Union Bank of Maryland, bearing date the 27th day of July, 1822. Its objects as set forth in the recital, was to secure the payment to the Union Bank of Maryland, of all and every sum, or sums of money then owing, or which might thereafter become due or owing from the said William Stansbury to the said bank, upon any promissory note or notes negotiated, or to be negotiated, at that bank, of which he was or might be either drawer or endorser. He is described as a merchant of the City of Baltimore, and it is apparent that by the execution of this deed, he designed not only to provide an indemnity to the bank for what he already owed, but to obtain for himself a credit at that institution, which would induce a more free discount or negotiation of notes, on which Stansbury's name should appear as either drawer or endorser. Such a facility is an object of primary importance to him who is engaged in commercial pursuits. Its value to Stansbury is manifest, enabling him to obtain an immediate accommodation discount of nine thousand dollars on his own note, without an endorser. In litigating these rights it is competent for either party to prove, what notes drawn and endorsed by Stansbury, and discounted at the Union Bank, existed on the 27th of July, 1822, when the mortgage was executed; and also all such as were negotiated at that bank, subsequently to that period. The first negotiation of Elizabeth Edwards' paper, was in September, 1822.

To this mortgage, Stansbury and the Union Bank alone were parties. Under it at law, no right was acquired, no interest passed; upon it, no action could be maintained but by the bank. All the circumstances which preceded its existence, and immediately followed its birth, demonstrate that the object of its execution was, not to indemnify those who were or might become his drawers or endorsers; but to ensure to the Union Bank, the payment of all notes negotiated by them, on which his name might appear either as maker or endorser. 'Tis *true, if the fund had been sufficient, those who were on his paper, would in equity be pro- **364**
 tected from loss. But this was a consequence, not the design of his act. The legal construction of this instrument, is in strict accordance with what we have stated as the manifest object of its creation. Such being the posture of the parties at law; upon what principle is it, that a Court of equity can be called on to change their condition? In construing agreements, it is said a Court of Chancery will sometimes adopt a more liberal and enlarged construction, than prevails at common law. But this latitude, if it exist at all, can never be tolerated, unless it be necessary to effectuate the motives which induced the contract. Here, no such necessity exists. The most perfect harmony prevails between the agreement executed, and the

obvious intention of its framers. To adopt the interpretation of the mortgage, which was insisted on for the appellee, viz: that the property was conveyed to the bank, in trust to be appropriated rateably to the payment of all notes negotiated with them, of which Stansbury was either the drawer or endorser, would be to defeat a leading object of Stansbury in making the conveyance. Instead of giving additional credit to his name, and a consequent increase to his favors at the bank; it would have been the most effectual means which he could have adopted, to exclude himself from all further discounts. As he then stood, the payment of the nine thousand dollar note, was amply covered by the property mortgaged. But every additional discount in proportion to its amount, reduced the security for the payment of that note. So that should the bank have increased their accommodations to Stansbury to ninety thousand dollars, they would thereby have relinquished nine-tenths of the security, which they had previously held for the payment of the note of nine thousand dollars. Nay, such are the positive terms of this deed, if clothed with the attributes of a deed of trust, which are attempted to be affixed to it, that should Stansbury, holding a real note of the most opulent merchant in Baltimore, have obtained its discount at the Union Bank, *eo instanti*, such merchant might demand its entire, or *pro rata* payment out of Stansbury's mortgaged estate,

365 The deed providing, not merely for the payment of notes negotiated for the account or accommodation of Stansbury, but of all notes bearing Stansbury's name, no matter for whom discounted.

The attempt to sustain the claim of the appellee by the doctrine of substitution, is equally untenable. Such relief is never extended to a security, but upon the assumption that the creditor's debt has been, or is to be fully paid; that his further detention of the mortgaged property is against equity and good conscience. Can it be deemed an equitable substitution, which, whilst it left in full force and unsatisfied, the just claims of a creditor, should wrest from him the fund specifically pledged for their payment, and leave him destitute of any other source to which he might apply for indemnity? If, after satisfying all debts due to the Union Bank on Stansbury's notes, by them discounted, there should remain a surplus of the mortgage fund: to that amount, might the drawers and endorsers of his accommodation notes, who had made payments to the Union Bank, seek to be substituted?

The order of the Chancellor ratifying the auditor's statement, making a rateable distribution of the proceeds of sale of the mortgaged premises, between Elizabeth Edwards, and the Union Bank of Maryland, is reversed with costs, so far as regards the application of the funds to the payment of Stansbury's notes negotiated at said bank. The order, so far as it ratifies the residue of said statement, is affirmed.

This Court will sign an order or decree, directing the trustee to pay the amount thus applied to the Union Bank of Maryland on account of William Stansbury's notes to them for \$8,700.

* HAYS *vs.* RICHARDSON.—December, 1829.

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No person who is called as a witness, not being a party to the suit, can refuse to give testimony on the ground, that he may thereby become liable to a civil action not of a penal nature, or sustain pecuniary loss, or that the verdict may be used as evidence against him in some other civil proceeding then pending, or which may thereafter be instituted. (a)

A witness on the *voir dire*, may by the party objecting to his examination-in-chief, for the purpose of shewing his interest, be called on to state the contents of written instruments, which are not produced; and the reason assigned is, that the party objecting, could not know previously, that the witness would be called, and consequently, might not be prepared with the best evidence to establish his objection.

An instrument of the following tenor—"I hereby authorize R. to open, and continue open, a road through my field, beginning at, &c. as also to build, keep in repair, and use a bridge over the branch, in the field on which the said road will pass, said road and bridge being intended as well for the public use, as the use of R.; and to continue until R. and myself shall agree it shall be shut up or altered;" executed under the hand and seal of the owner of the land, is a grant of an incorporeal hereditament, a right of way *de novo*, which will endure until both parties agree upon its discontinuance, and which must be acknowledged, and recorded according to our Acts of registration. (b)

(a) See *Taney vs. Kemp*, 4 H. & J. 282, note (a); *City Bank vs. Bateman*, 7 H. & J. 84, note (c); *Wolf vs. Wolf*, 2 H. & G. 285, note (b).

(b) Approved in *Long vs. Buchanan*, 27 Md. 516; *Polk vs. Reynolds*, 31 Md. 112; *Partridge vs. First Church*, 39 Md. 637; *Rayner vs. Nugent*, 60 Md. 519. See also *Mitchell vs. Seipel*, 53 Md. 251. Under Rev. Code, Art. 44, sec. 1, no interest in or concerning land, for a term exceeding seven years, can be transferred otherwise than in the mode prescribed by statute, and no act *in pais* is competent for that purpose. *Polk vs. Reynolds*, *supra*. A mere license is revocable. But where it is connected with a grant, the party who has given it cannot in general revoke it, so as to defeat the grant to which it is an incident. In all cases of a license by parol, where the grant is of a nature capable of being made by parol, the license is irrevocable. But where the license by parol is coupled with a parol grant of something which is incapable of being granted otherwise than by deed, or by compliance with a statutory requirement, then the license is a mere license because the grant annexed to it wants legal validity; and like all mere licenses it is revocable. *Long vs. Buchanan*, *supra*. A certificate of ownership of a lot in a cemetery, not under seal and not acknowledged or recorded, confers no title or estate in the soil, nor does it operate as a grant of an easement. The right to an easement must be founded upon a grant by deed, or upon prescription, for it is a permanent interest in another's land, with a right of enjoyment, whereas a mere license is but an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein. *Partridge vs. First Church*, *supra*. See note (d) *infra*.

- right of way *in esse* may pass by deed of bargain and sale, duly acknowledged and recorded. (c)
- transfer of way *de novo* may be by grant or lease, but cannot be effected by way of bargain and sale.
- right of way may be said to lie in the county where it exists, or is exercisable.
- the Acts of Assembly of 1715, ch. 47, and 1766, ch. 14, being in *pari materia*, incorporeal tenements, and hereditaments, there is no reason why they should be excluded from the second. The Act of 1766, cannot be confined to conveyances only by which the land itself passes, for the design was, that all rights, incumbrances, or conveyances, touching, connected with, or in any wise concerning land, should appear upon the public records. (d)
- contradictions or incongruities exist between the preamble, and enacting clause of a statute, the latter shall prevail. (e)
- cotemporaneous, unvarying construction of an Act of Assembly, for sixty years, ought not to be disregarded but upon the most imperious and conclusive grounds. (f)

APPEAL from Harford County Court. This was an action on the case for obstructing a way, whereto the plaintiff below (now appellee) claimed right by virtue of an instrument of writing under the hand and seal of one said Joshua S. Bond. The declaration stated that on the 7th of October, 1820, at, &c. a certain Joshua S. Bond, being seized in his demesne as of fee of a certain close here situated, by his grant under his hand and seal, bearing date the day and year aforesaid, (which is now here shown to the Court) authorized the plaintiff to open and continue open, a road through is, the said Joshua S. Bond's field, to wit: The said close beginning at the end of the short lane near the house of the plaintiff, and intersecting the Baltimore road, near a chestnut tree; and the said Joshua thereby also authorized the plaintiff to keep in repair, and so a bridge, over the branch running through the said field. And the plaintiff also says that by the grant aforesaid, it was declared that the said road and bridge were intended as well for the use of the public at large, as for the use of the plaintiff, and that the said uses were to be enjoyed until the plaintiff and the said Joshua S. Bond should agree that the said road, intended to be opened as aforesaid, should be shut up or altered. And the plaintiff avers that afterwards, &c. he opened a road through the said close of the said

(c) Cf. *Wright vs. Freeman*, 5 H. & J. 383, note.

(d) Distinguished in *Addison vs. Hack*, 2 Gill, 229, and *Baltimore vs. Tuck, J.* in *Carter vs. Hurlan*, 6 Md. 28, holding that a right to overflow another's land is an interest in land which cannot pass by parol.

(e) See *Darvill vs. Clayland*, 1 H. & J. 840, note.

(f) Cf. *State vs. Buchanan*, 5 H. & J. 261; *Harrison vs. State*, 22 Md. 469; *Fiersted vs. State*, ante, m. p. 231.

Joshua, beginning at the end of the said short lane near his, the plaintiff's house, and terminating at, or near a chestnut tree, thus intersecting the road leading towards Baltimore, and continued to pass and repass over the said road with his servants and horses, &c. for a long space of time, to wit, at, and, &c. And he further avers that after the said road was opened, the citizens of this State passed and repassed over the said road. And the plaintiff further avers that after the said road had been opened by him as aforesaid, while the said grant was in full force and effect, and had not been determined nor any agreement made between the said Joshua S. Bond, and the plaintiff, by which the said road should be shut up or altered; the defendant well knowing the premises and disregarding the rights of the plaintiff, and intending to injure the plaintiff and deprive him of the use and benefit of the said way, to wit, on the 10th of August, 1823, and on divers other days and times, &c. obstructed the same road, by placing, &c. and demolished the bridge across the same, &c. by means thereof, the plaintiff could not * during the time aforesaid, have or enjoy his said way, as he of right ought to have done, **368** to wit, at, &c. And the plaintiff further says, that he during the time aforesaid, being a public inn-keeper, was much damaged and injured in his trade and calling by divers citizens, as well travellers as others, during the said time being greatly obstructed and hindered in their passage to and from his said inn, the said road hereinbefore mentioned, then and there leading from or near his said inn, to the said other road leading towards the City of Baltimore, to wit, at, &c. Wherefore the defendant (the appellant) pleaded not guilty, and issue was joined.

1. At the trial, the plaintiff called Francis A. Bond as a witness, who being examined by the defendant on the *voir dire*, stated that in case the plaintiff should recover in this cause, he considered he should be obliged to pay the defendant the amount of the verdict, damages and costs, as one of the heirs of Buckler Bond, who had conveyed with the covenants in the deed hereinafter inserted, the land over which the way in the declaration mentioned passes, to the defendant before the time stated of the trespass complained of, and that he was unwilling to testify in this case for the plaintiff. The defendant then prayed the Court that the witness should not be compelled to testify for the plaintiff. But the Court [HANSON, A. J.] directed the witness to be sworn; and he was sworn accordingly in chief. The defendant excepted.

2. The defendant further asked the witness Francis A. Bond, while on his *voir dire*, if in addition to the interest mentioned in the first bill of exceptions, he was or was not interested as the holder of a promissory note or acceptance, conditioned to be paid only after deducting the damages and costs in this case, that might be recovered from the defendant. But the Court held that witness could not

answer this question, inasmuch as the note spoken of
duced. The defendant excepted.

3. The plaintiff then proved that the said Joshua L.
tioned in the declaration in this cause, was seized in fee
over which the said road passed; that the said Bo
369 the plaintiff the following instrument of writing
duly proved. "I hereby authorize William Richardson
continue open a road through my field, beginning at the
short lane near his house, and intersecting the present
road, at or near a chestnut tree, as also to build, keep in
use a bridge over the branch in the field on which said road
said road and bridge being intended as well for the public
use of Wm. Richardson, and to continue until William I
and myself shall agree it shall be shut up or altered. W
hand and seal this 7th day of October, 1820.

JOSHUA S. BOND,

And that the plaintiff opened the said road and rep
bridge in pursuance of the terms of the said instrument of
and used the same; and that the defendant on the 20th of
1823, obstructed the road aforesaid as stated in the declara
the plaintiff who was a tavern keeper by the obstruction
was with many others prevented from using the said way.
defendant then offered in evidence a deed duly acknowledged
recorded from said Joshua S. Bond and a certain Buckler Bo
veying said land to defendant in fee; dated the 4th of Jun
which contained a covenant against all prior incumbrances an
And upon which deed there was a certificate of the delivery o
to the defendant, who further proved, that on the day on wh
deed aforesaid was executed, that the said Bond delivered pos
of the land mentioned in said deed to him. The defendan
prayed the Court to direct the jury, that the plaintiff was
titled to recover, which direction the Court refused to give.
defendant excepted; and the verdict and judgment being a
him, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MAJ
and DORSEY, J.J.

Mitchell and R. Johnson, for the appellant, contended: 1.
the agreement of Bond with the plaintiff was no grant, and could
be pleaded as such.

2. That if it was a license, it was determinable at the wi
370 Bond.

3. That if not so, the remedy was against Bond only, and
against the defendant, who was a purchaser of the soil without not
of this claim.

4. That if it were a grant, it ought to have been recorded to ta
effect against the defendant, as a purchaser without notice.

5. That if it is to operate as a grant, or otherwise to confer an interest, it is a public road, for the obstruction of which no private action can lie in favor of the plaintiff.

6. That there is a variance between the contract proved, and that declared upon.

7. As to the first bill of exceptions, the witness was directly interested in the event of the suit, and the verdict would have been good evidence against him; and, therefore, as a party interested could not be compelled to testify.

8. As to the second bill of exceptions, the question to the witness was proper, notwithstanding the non-production of the note.

On the first point, they cited 3 *Bac. Ab. tit. Grants*, (G) 387. On the second, 4 *Bac. Ab. tit. Leases for Years*, 178; *Bishop of Bath's Case*, 3 *Coke*, 35; 2 *Blk. Com.* 146; 4 *Com. Dig. tit. Estate*, (H) 60, 63. On the third and fourth, *Whitbeck vs. Cook*, 15 *Johns.* 487; *Kellogg vs. Ingersoll*, 2 *Mass.* 97. On the fifth, *Butler vs. Kent*, 19 *Johns.* 226; *Co. Lit.* 56, (a); *Harrison vs. Parker*, 6 *East*, 152. On the sixth, 3 *Stark. Ev.* 1587, 1588; 1 *Chitty Pl.* 364; *Brook vs. Willet*, 2 *H. Blk.* 234; *Rogers vs. Allan*, 1 *Camp.* 315, note (a); *Coryton vs. Lithebye*, 2 *Saund.* 113; *Mellor vs. Shapeman*, 1 *Saund.* 346, note 2; *Esp. Ev.* 274, 275; *Doe vs. Calvert*, 2 *East*, 377; *Alban vs. Brownsell*, *Yelv.* 164; 1 *Hawk. Ch.* 76; 3 *Jacob L. D.* 280. On the seventh, *Taney vs. Kemp*, 4 *H. & J.* 342; 1 *Stark. Ev.* 135, note; 2 *Ib.* 744, 747; 3 *Ib.* 1728, 1648; *Rex vs. Gisburne*, 15 *East*, 57. On the eighth, 1 *Stark. Ev.* 120; 2 *Ib.* 756; *Botham vs. Swingler*, *Peake, N. P.* 218; *S. C.* 1 *Esp.* 164; *Corking vs. Jarrard*, 1 *Camp.* 37; *Butchers' Co. vs. Jones*, 1 *Esp.* 162; *Butler vs. Carver*, 2 *Stark. Rep.* 433; *Rex vs. Gisburne*, 15 *East*, 57.

Gill, for the appellee, said that the third bill of exceptions covered the whole controversy and contended. 1. That the deed from Bond to Richardson, is a grant or an effectual contract operating as a grant, to endure until the parties determine the right secured by it. 3 *Bac. Ab. tit. Grant*, (F) 386, 387, (I) 393; *Shove vs. Pincke*, 5 *T. R.* 124; *Chatham vs. Willan*, 4 *East*, 475, 476; *Chester vs. Willan*, 2 *Saund.* 99, (note 1); 4 *Jac. L. D. verb License*, 158. 2. That if not a grant it is a covenant that Richardson shall use the way. *Bac. Ab. tit. Covenant*, 62. 3. A covenant to enjoy to right the way operates as a grant. 3 *Com. Dig. tit. Chemin*, (D), 60. 4. It is a private way; the public using it and the sale of the land over which it passes, after the grant, do not determine Richardson's right. *Allen vs. Ormond*, 8 *East*, 4; 4 *Jacobs L. D.* 158; 3 *Cruse Dig. tit. Way*, 115, s. 22 1 *Bac. Ab. tit. Authority*, (P), 321; 3 *Stark. Ev.* 1680, (note 1). He also cited, *Whitbeck vs. Cook*, 15 *Johns.* 483; 3 *Cruse*, 110; *Jackson vs. Aldrich*, 13 *Johns.* 106; *Allan vs. Osmond*, 8 *East*, 4.

* DORSEY, J. delivered the opinion of the Court at this term. The only question arising on the first bill of exceptions is, were the Court below, right, in compelling, a witness to give tes-

timony, which might subject him to a civil action or pecuniary loss, when offered by the party against whom, his interest would prompt him to testify? On this subject, we have no doubt, since the decisions of this Court, in the cases of *Taney vs. Kemp*, and *the City Bank of Baltimore vs. Bateman*. In Maryland, the rule of law is settled, that no person who is called as a witness, (not being a party in the suit) can refuse to give testimony on the ground, that he may thereby become liable to a civil action, not of a penal nature, or sustain pecuniary loss, or that the verdict may be used as evidence against him, in some other civil proceeding then pending, or which may thereafter be instituted. Of the opinion of the County Court on this point in the cause, we entirely approve, but we cannot concur with them, in the decision they have given in the second bill of exceptions. It is wisely settled agreeably to the suggestions of public justice and expedience, that a witness on the *voir dire* may by the party objecting to his examination in chief, for the purpose of shewing his interest, be called on to state the contents of written instruments, which are not produced, and the reason assigned is, that the party objecting could not know previously, that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection. For authorities on this subject. *vide* 1 *Stark. Ev.* 120; 2 *Stark. Ev.* 756, and the cases there referred to. In the third bill of exceptions is involved a question of much greater difficulty and doubt. If the instrument of writing given by Bond to the appellee, be considered a grant of an easement or right of way, (as according to law and the apparent intent of the parties, it may be, if viewed without reference to our Acts of registration) then it becomes necessary to examine what is the character of the interest transferred, and how far it is a subject operated on, by the Act of Assembly of 1715, ch. 47, entitled "an Act for quieting possessions, enrolling conveyances, and securing the estates of purchasers."

377 It has been urged that the right transferred, * is nothing more than a tenancy at will. But such a construction is not warranted by the terms of the contract. It is not a demise, or conveyance to continue, in the appropriate phraseology of such tenures "*quamdiu ambobus partibus placuerit*," and which, by the unambiguous terms of its creation, must expire as soon as its continuance ceases to be the will of both parties; but it is a grant whose duration is not to terminate until the will of both parties unites for its discontinuance. In the language of the agreement, it is to continue until Richardson and Bond shall agree, it shall be shut up or altered. Bond's determination alone, therefore, as evidenced by his conveyance to the appellant, is not a happening of the contingency on which the estate was made to depend. It is unnecessary to determine whether this easement was to expire with the life of Richardson, or to remain after his death for the use of the public; in either event, enrollment is necessary, if the subject-matter of conveyance

be such as is contemplated by either of the aforementioned Acts of Assembly. The title of the first Act of Assembly distinctly sets out its object, viz: the “quieting possessions, enrolling conveyances, and securing the estates of purchasers,” and for the accomplishment of that most desirable end, the 8th section provides that “no manors, lands, tenements or hereditaments whatever, within this Province, shall pass, alter or change, from one to another, whereby the state of inheritance or freehold, or any estate for above seven years shall be made or take effect in any person or persons, or any use thereof to be made, by reason of any bargain and sale only, except the deed or conveyance by which the same shall be intended to pass, alter or change, be made by writing, indented and sealed, and the same be acknowledged in the Provincial Court, or before one justice thereof, or in the County Court, or before two of the justices of the same, where such manors, lands, tenements, or hereditaments lie, and enrolled within six months after the date of such writing as aforesaid.” The first enquiry to be disposed of is, whether the estate or right designed to be transferred by the grant, be an hereditament, (as that is the most comprehensive term, including both lands and * tenements.) In 2 *Bla. Com.* p. 20, an incorporeal hereditament is defined to be “a right issuing out of a thing corporate 378 (whether real or personal) or concerning, or annexed to, or exercisable within the same,” which incorporeal hereditaments, the learned commentator states in the succeeding page, “are principally of ten sorts, advowsons, tithes, commons, ways, offices, dignities, franchises, corrodies or pensions, annuities and rents,” and in page 35 of the same book, it is said “a fourth species of incorporeal hereditaments is that of ways, or the right of going over another man’s ground. This may be grounded on a special permission, as when the owner of the land, grants to another the liberty of passing over his grounds, to go to church, to market, or the like; in which case the gift or grant is particular, and confined to the grantee alone, it dies with the person.” These references will suffice to show, that the way in question, is an hereditament. Is it then such an hereditament as the Act of 1715 can operate on? is the next question to be considered. That Act of Assembly, as appears by the preamble to the Act of 1766, is only applicable to such conveyances as operate by way of bargain and sale, and it is superfluous perhaps to say, that in all our legislation upon the subject of enrollment of deeds, where “hereditaments” are spoken of, they are such as attach or relate to realty, not to personalty. If the deed from Bond to Richardson had been for the transfer of a right of way *in esse*, there can be no doubt, but that it would pass by deed of bargain and sale; and that for the legal transfer of such an interest by deed of bargain and sale, all the solemnities required by the Act of 1715, must have been pursued. But such is not the case before us; it is an attempt to transfer, not a way already *in esse*, but a way *de novo*, which may be done .

by grant or lease; but cannot be effected by way of bargain and sale. As authorities to that effect, see *Beaudley vs. Brook, Cro. Jas.* 189; 1 *Ba. Abr.* 468, *tit. Bargain and Sale, letter B*; and *Shep. Touch.* 226, and the cases there cited. It is assuredly no disrespect to the Legislature of 1715 to suppose, that at the time of their passage of the law referred to, they may not have recollected this technical, subtle distinction, between the mode of * transferring
379 rents and ways *in esse*, and *de novo*, and they may therefore have acted under the impression, that their Act, chapter 47, affected the one in the same manner that it did the other. But, whether they did, or did not labor under this misconception of the law, according to our view of the rational, liberal construction, that ought to be given to acts of the Legislature, upon such subjects as the present is wholly immaterial.

Experience having shown, according to the preamble to the Act of Assembly of November Session, 1766, chapter 14, "that the good end and purposes of the said Act (meaning the Act of 1715,) are now in a great measure eluded by the frequent use of conveyances, feoffment, lease and release, limitation, and declaration of uses, and other modes of conveying; and whereas a general registry of all deeds and conveyances of land, would very much tend to the security of creditors and purchasers, the preservation of titles, and thereby, to the advancement of the value of real estates, and particularly, to prevent abuses and deceits, by mortgages, and the purchase of pretended titles;" the Legislature enacted "that after the first day of May next, (1767,) no estate of inheritance or freehold, or any declaration or limitation of a use, or any estate for above seven years, shall pass or take effect, except the deed or conveyance by which the same shall be intended to pass or take effect, shall be acknowledged in the Provincial Court, or before one of the Justices thereof, in the County Court, or before two justices of the same county, where the lands, tenements, or hereditaments conveyed by such deed or conveyance do lie." It has been urged, that as the preamble to the Act of 1766, speaks merely of a general registry of deeds or conveyances of "land," that no recording is required by it, but of deeds or conveyances, by which the land itself passes; and that this construction is strongly supported by the words of the enacting clause, which requires the deed to be recorded in the county where the lands, tenements, or hereditaments do lie; and the clerks to keep books in which the deeds are to be registered, and alphabetted in the name of the parties thereto, with the name of the land and quantity of acres. But these suggestions appear much more technical and critical than
380 * substantial. Both Acts of Assembly being in *pari materia*. must be construed together as one system. The first law having embraced incorporeal tenements and hereditaments, ingenuity itself cannot insinuate a reason why they should not be included in the second. To confine that Act of 1766 to conveyances

only, by which the land itself passes, is utterly subversive of that complete system of enrollment, manifestly designed to be established; is inconsistent with that part of its preamble, which sets out the moving inducement to legislate on the subject to be, to remedy the evil, that the Act of 1715, extends only to conveyances of lands, tenements and hereditaments, by way of bargain and sale only, and that other modes of conveyance (meaning by necessary implication of lands, tenements and hereditaments,) had been frequently used to the elusion of the good ends and purposes of that law; and is also inconsistent with that part of the preamble, which declares as the objects of the Legislature in adopting a general registry, to be “the security of creditors and purchasers, the preservation of titles, and thereby the advancement of the value of real estates.” If the contradictions, or incongruities exist between the preamble and enacting clause of a statute, the latter shall prevail. There is, however, no such contradiction or incongruity, in the Act in question; construe the word “of” before the word “land,” to mean concerning or relating to (meanings of which it is also susceptible, and not unfrequently bears) and perfect harmony is at once restored. By no rule of interpretation can the force of the words “tenements or hereditaments” be evaded, or their introduction into the enacting clause be accounted for, consistently with this confined exposition attempted to imposed on the Act of 1766. As to the stress which has been laid upon the words “do lie,” to prove that they can relate to lands only (as incorporeal hereditaments, it is said cannot be alleged to lie any where) it appears to be a construction too subtle, not to say hypercritical, to have entered into the consideration of the Legislature in passing the law. Nor are we aware that it would be an unwarrantable invasion of the rules of grammar, of the import of terms, or the licensed figures of speech, to say, that a right of way lies in a *county where it exists and is exercisable. As to the alphabet to be kept by the clerk, with the 381 entries to be made of the name of the land, and number of acres, those requisites are applicable to the transaction, as important, and necessary to the public in recording a deed transferring an incorporeal hereditament concerning land, as if it had been a conveyance of the land itself. If this cramped interpretation of the Act of 1766; were to prevail, by no possible deed of conveyance *in pais* could the husband and wife uniting, grant a rent charge or right of way, on the lands of the *feme*, so as to bind her or her heirs after the death of her husband, and the public, and the profession, would learn with astonishment at this day, that notwithstanding our system of general registry—a grant of a rent charge *de novo*, equal to the whole value of the land on which it attaches, and rights of way, estovers, &c. to any supposable extent, may be legally created, without any entry thereof appearing on the public records; but if a rent charge or right of way *in esse* be conveyed by bargain and sale (the usual mode

of conveyance) then all the solemnities of acknowledgment, registration, &c. are required. *Cui bono?* It adds nothing to the security of creditors or purchasers of land, or the preservation of their titles, because such enrollment furnishes them no means of ascertaining the existence of the conveyances. The alphabets discloses not the name of any person, as a party to such conveyance, who ever owned the land, nor in your application to the clerk of the land records, can you inform him in whose name the search is to be made. It is a matter of minor importance to creditors or purchasers, to whom a rent charge is payable, (they are rarely for any length of time left uninformed upon that subject) but it is a matter of vital importance to them to know, whether there be a rent charge or not. In the registry of deeds, therefore, it is an object of ten times more importance "to the security of creditors and purchasers, the preservation of titles, and the advancement of the value of real estates" that a record should be made of *de novo* rent charges, and incumbrances on land, than of those *in esse*. The former are always sought for, and might, be easily found by creditors and * purchasers; whilst
382 the latter are rarely if ever sought for, and could not be found, but by reference to every deed recorded in the land records, since the date of the patent of the tract of land, into the title of which the examination may be made.

We are aware that it has been ruled in England, that a license to use a beneficial privilege upon the land of another is no estate or interest in the land, and notwithstanding the Statute of Frauds may be granted without writing. In the case of *Wood vs. Lake*, *Say*. 3, it was decided that a parol agreement for liberty to stack coals upon the land for seven years, and to have the sole use of that part of the close upon which the liberty to stack coals was given, is neither an estate or interest in or out of land. According to this decision, if A. by parol for valuable consideration agree that B. may stack coals upon his lands for ninety-nine years, renewable for ever; and that B. and his assigns during that period, have the sole use of the lands, such agreement is unaffected by the Statute of Frauds, and though operative to the full extent of its terms, transfers no estate or interest in the lands. Yet in the leading case of *Crosby vs. Wadworth*, 6 *East*, 602, a parol sale of standing crop of mowing grass then growing was held to be within the statute as being an interest in the land. In *Wood vs. Lake* the Judges rely on the case of *Webb vs. Paternoster*, reported in *Palmer*, 71, and *Popham*, 151. Where a parol license to stack hay upon land was held a charge upon it, in whosoever hands it might come; but say the Court, it is countermandable unless a time certain is fixed for its enjoyment, "as if I license one to dig clay in my land." This case let it be remembered, was before the Statute of Frauds; and therefore could be no warrant for the decision in *Wood vs. Lake*. In fact the only question which could have arisen in *Webb vs. Paternoster*, as to the necessity of writing to the transfer of such an inte-

rest, as that attempted to be created, must have been on the old principle of the common law; that an incorporeal right could only pass by deed. But if the opinion of the Court in that case are to govern cases since the Statute of Frauds, are we prepared to go to the length to which those opinions must carry us? To determine that a parol license to dig clay in land, * is the same as the privilege to stack hay on it; but gives no interest in the land, 383 though a charge upon it into whosoever hands it may come. Or to illustrate the principle still further, that an oral license to dig coal or iron ore in mines for five hundred years, and agreeably to the case of *Wood vs. Lake*, to have also the sole use of the land, in which the mines are situated during that period, passes the right intended to be conferred, and charges the land therewith, is unaffected by the Statute of Frauds, and yet creates no lease, estate, or interest in the land. It cannot be denied that the case of *Wood vs. Lake*, has in England been followed by subsequent adjudications. As late as the year 1818, in *Taylor vs. Water*, 7 *Taunt.* 384, Gibbs, Chief Justice of the Common Pleas, states that a license to enjoy a beneficial privilege on land may be granted without deed, and notwithstanding the Statute of Frauds without writing. It is a license, not an interest in the land. But these decisions are irreconcilable with the opinion of Lord Ellenborough, in *Fentiman vs. Smith*, 4 *East*, 107, where the defendant having orally granted permission to the plaintiff to pass water to his mill by means of a tunnel over defendant's land; who assisted in making the tunnel, but afterwards obstructed the water, in an action brought on account thereof, it was decided that "the title to have the water flowing in the tunnel over the defendant's land could not pass by a parol license without deed." *Sugden* too in his *Law of Vendors*, page 57, attacks the case of *Wood vs. Lake* with great effect, and pronounces it "to be in the very teeth of the statute, which extends generally, to all leases, estates, or interests." In *Thompson vs. Gregory*, 4 *John.* 81, the Supreme Court of New York, (of which Kent and Spencer were members) determined that a right to overflow the land of another, by the erection of a mill dam, was an incorporeal hereditament, which could be transferred by deed only, not by parol permission to use it; and if it were otherwise that the assignment of such an interest, since the Statute of Frauds must be in writing.

With such strong reasons and high authority for questioning the soundness of the principles adjudicated in *Wood vs. Lake*, and subsequent cases which have followed it, we feel no * disposition for the sake of analogy to give a similar interpretation to our 384 Act of Assembly of 1766, regulating the execution and enrollment of conveyances of real property to that given in *Wood vs. Lake* to the Statute of Frauds. The language of its provisions comprehends the privilege attempted to be conferred by the instrument before us, and the policy of the law, the interests and convenience of the public,

forbid that we should restrict its operation. In no other way can the leading object of the Legislature, the "securing the estates of purchasers" be effected; their design was that all rights, incumbrances, or conveyances, touching, connected with, or in any wise concerning land, should appear upon the public records. If parol or unrecorded licenses of the character of that in controversy were tolerated, frauds and losses upon purchasers would be innumerable as may readily be imagined. A man might pay and receive a deed with all the solemnities of law and covenants which could be devised (short of a general warranty, which is rarely given) for a hundred acres or more of valuable meadow land, without the knowledge of the semblance of a right in any one by which its value could be imagined; on the next day he may learn that his purchase is a mockery; that his neighbor under an oral license from some remote proprietor of the property purchased (of which the vendor was ignorant,) is about to inundate every foot of it by the erection of a mill-dam below, his remedy can no where be had. But suppose it were even admitted that the principles established in *Wood vs. Lake*, and the cases bottomed upon it, stand free from all exception, it is humbly conceived that the case now under consideration is clearly distinguishable from them. The Statute of Frauds, on the construction of which they arose, speaks only of estates or interests into or out of lands, whilst our Act of Assembly embraces estates in lands, tenements or hereditaments, and if it be conceded, as it must be, that the right of way in question is an "hereditament," it surely would be stretching technicality to the verge of quibbling to say that the right which one has in an "hereditament" is not his "estate" in it.

385 * If we entertained even strong doubts as to what originally should have been the construction of this Act of Assembly (of which we have none,) they would in a moment be removed by adverting to the single fact, which the whole land records of the State will demonstrate, that from the year 1767 to the present day, grants and conveyances of *de novo* rent charges, rights of way, &c. have been as uniformly acknowledged and recorded as deeds conveying the land itself. This contemporaneous unvarying construction of the Act of Assembly for sixty years ought not to be disregarded but upon the most imperious and conclusive grounds. If there be error in it "*communis error facit jus.*" We are sensible that we have given just cause of complaint at the unusual length in which this subject has been treated, but the deep interest felt in it by every landholder in the State must be our apology.

We concur in the opinion given by the County Court in the first bill of exceptions, but think their opinions in the second and third are erroneous, and therefore

Judgment reversed.

[NOTE.]—The decision of the Court of King's Bench in *Hewlins vs. Shipman*, 5 Barn. & Cres. 221, has been met with since writing the

above opinion, by which it appears that the cases of *Webb vs. Paternoster*, *Wood vs. Lake*, and *Taylor vs. Waters*, have been so shaken that they may be considered as virtually overruled, so far as regards the granting of easements by parol.—[G. & J.]

CHARLES C. EGERTON *et al.* vs. THOMAS B. REILLY AND WIFE.
December, 1829.

A complainant filed an exception to an answer, and the County Court without deciding upon it, referred the case to the auditor, who stated an account, rejecting a credit claimed by the defendant's answer; to this, exceptions were also filed, and overruled, and the account ratified. Upon appeal, it was *held*, that the County Court had acted prematurely, that after the exceptions to the answer had been decided on, the case should have * been set down for argument on bill and answer, or a replication to the answer put in, and an opportunity afforded **386** to the respondent, to make out his defence, by proof. (a)

APPEAL from an order of Saint Mary's County Court, sitting as a Court of Chancery, confirming the report of the auditor of that Court. The bill filed on the 9th of August, 1824, by the complainants (now appellees,) stated, that H. G. S. Key, one of the defendants, was indebted to the complainant, Rebecca Reilly, before her marriage, in the sum of \$266.65; that the defendant, Charles C. Egerton, was in the habit of supplying her with such articles as she required (he, the said Egerton, being a merchant, residing in said county,) and that she was likewise in the habit, occasionally, of making small purchases of the Messrs. Shemwells, likewise merchants of the said county. That for the purpose of securing them, and giving the said Rebecca a further credit with the said Egerton, she agreed to give him a control over the debt, due her as aforesaid from the said Key, with the express understanding that the sum then due the said Egerton and Shemwells should be paid by said Egerton out of said debt, and the balance held subject to the order of said Rebecca; in pursuance of said understanding, the said Rebecca gave to the said Egerton an order, dated the 29th of April, 1822, on said Key for said debt, which was accepted, he, the said Key, being aware of the said understanding. That Key afterwards gave his single bill to Egerton for the amount, who thereupon brought suit and recovered judgment. That Egerton has paid no part of the debts, which according to the foregoing understanding he was to have paid out of the money due from Key, nor did he give the credit to the said Rebecca which he stipulated to do; but they charge, that combining with Josiah and Philip Turner, also defendants, and intending to defraud the complainants of said debt, and convert the same to his use; and the

(a) See *Equity Rules*, Rule 28.

use of the said Josiah and Philip, he had assigned to them of said judgment, when in fact the complainants who have satisfied the purposes for which it was placed in the hands of the said Josiah and Philip, which it is much more than sufficient to do. Pray
387 * account may be stated between the said Egerton and the complainants, and that the aforesaid judgment may be set aside, and in the meantime that an injunction may issue restraining the payment of the money. Injunction granted.

The answer of Egerton admits that Rebecca, before her marriage, was in the habit of getting family supplies from Egerton and Pike, of which he was a member, for her credit from the Messrs. Shemwells, and that she gave the draft to Key, as stated, for which he gave his single bill. That bill was put in suit, and before judgment was obtained the same to Josiah and Philip Turner; but he alleges that a settlement was made for a valuable consideration, being of a heavy amount due from him to them; he states, upon telling him that he had assigned the claim to the judgment Court he was asked by Key if he wanted the Key, applied to Josiah who was present, and an arrangement was made between them; that he, this day, owes the Turners a considerable balance. He admits, that the draft was given it was understood that the debt of Rebecca with Egerton and Pike were to be paid out of the time the draft was given amongst others, one due to Key, were also to be paid, as well as the claim against the Turners, which deducted from the amount of the said draft leave a balance of \$38.91, which is all he justly owes; that at the time the note of Key was executed, understanding that he should hold the balance which was of the same for the use of complainants, but states that he was to be individually responsible for any such balance. He denies any agreement with Josiah and Philip Turner state that the assignment was made for a valuable consideration by Egerton whilst in suit. That the heavy balance is still due from Egerton and the complainants, or either of them and Egerton, and of their having heard Egerton say, he might owe a small sum to the Turners. The defendant, Josiah Turner, states, that the judgment Court, Key acknowledged the justice of the

The answers of Josiah and Philip Turner state that the assignment was made for a valuable consideration by Egerton whilst in suit. That the heavy balance is still due from Egerton and the complainants, or either of them and Egerton, and of their having heard Egerton say, he might owe a small sum to the Turners. The defendant, Josiah Turner, states, that the judgment Court, Key acknowledged the justice of the

judgment asked for indulgence, which was granted on certain terms then agreed upon.

The answer of Key admits the debt, and denying all fraud, &c. says he is ready to pay the money as the Court may direct.

At May Term, 1825, the complainants filed exceptions to the answer of Egerton, upon the ground that the attempt to charge them with a debt due from F. P. Key was made without any memorandum or note signed by either of them, or any other person, by them authorized to that effect.

At August Term, 1825, the Court referred the case to the auditor, with directions to state an account, which was accordingly stated, and reported to the following March Term. At that term the defendants excepted to the said report of the auditor, upon the ground, that he had not given them credit for the amount of the claim spoken of in the answer of Egerton, as due him from F. P. Key, but the Court overruled the said exception, and ordered that said report be ratified and confirmed.

From which order the defendants appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE and DORSEY, JJ.

A. C. Magruder for the appellants.

No counsel appeared for the appellees.

* EARLE, J. delivered the opinion of the Court. However the decision in this case in itself may be viewed, it was certainly premature, and in this the equity jurisdiction below, committed an error. 389

Before the exceptions to one of the answers was disposed of, the Court passed an order, directing the auditor to state an account of the amount of the debt due to the complainants, after deducting the debts due from the complainants to the defendant, Egerton, including the item for postage, according to the terms of the order filed in the cause; and subsequently ratified and confirmed the auditor's report and statement thereon, excepted to by the defendants.

The exceptions to the answer being decided on, the case should have been set down for argument on bill and answer, or a replication to the answer put in, and an opportunity afforded to the respondents to make out their defence by proof.

The real object of the order of the 29th April, 1822, and the transaction growing out of it, might then have been understood, and if Egerton's right to apply a part of it to the discharge of Francis P. Key's account had not been substantiated by evidence, the auditor's report rejecting it would have been free of exception, and the case of Egerton so far properly settled against him.

An opportunity to the Turners would also have been offered to show, that their connection with the transaction of the assignment

of Key's single bill, was fair and *bona fide*, and made to them for a valuable consideration, and trust and confidence between Rebecca Key and to the debt due from H. G. S. Key to her.

We reverse the order confirming the audit, and may still take this course in Saint Mary's Court, as it appertains to equity and justice may yet be done by the parties in that tribunal.

Order reversed; and adjudged, ordered at the Court of Appeals, that the order of Saint Mary's Court, of equity, confirming the report of the audit, **390** same is hereby reversed and annulled. The Court proceeded in the cause, so that equity was done to the parties. Further adjudged, that the appellants bear their costs on this appeal.

MILLER, Ex'r of BEARD vs. NEGRO CHARLES

By a devise in the following words, viz: "likewise, to be free on the 1st day of January, 1827, or the sum of ten dollars annually, to my before named slave, if he live." It was the intention of the testator, that the slave mentioned in the devise should be free, and it could not have been his intention that the slave should have been performed by Charles, provided the acts to be done consist of payments to be made as he may live.

Upon a petition for freedom by a negro claiming under a last will and testament, against the master, the parties agreed upon a statement, to show close whether the testator left assets sufficient to pay the debts or not; held that the objection to the petition on the ground of the insufficiency of assets was not before the Court.

APPEAL from Anne Arundel County Court for freedom filed in Anne Arundel County Court March, 1828. The following statement of the opinion of the Court.

It is admitted in this cause, that the said slave of John W. Beard, the appellant's testator, died in October, 1825, having first made his last will and testament, which is recorded in the Court of Anne Arundel County; in which last will and testament, the following clause, "likewise," my slave, to be free, on the first day of January one thousand

(a) Cited in *Keller vs. State*, 12 Md. 328.

twenty-seven, on condition that he the said Charles, pay the sum of ten dollars annually to my before named sister, Mary Glover, so long as he lives. It is also admitted that the negro Charles, the * petitioner, and the negro Charles mentioned in the said clause, are **391** one and the same person, and that he was, at the death of the said John W. Beard, and on the first of January, 1827, under the age of forty-five years, and able to gain a sufficient livelihood and maintenance; and it is also admitted, that the said negro Charles paid to the said Mary Glover, the sum of ten dollars in January, 1828, agreeably to the annexed receipt marked A, for the year 1827. It is further admitted, that at the death of said Wesley Beard, and also at the time of the payment of the said ten dollars, the said Mary Glover was a *feme covert*. And it is further admitted, that the said negro Charles was held as a slave by the personal representative of the said John W. Beard, from the death of the said John W. Beard till the first of January, 1827.

The County Court rendered judgment on the case stated in favor of the petitioner, and the defendant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and ARCHER, JJ.

Speed, for the appellant, * referred to the Act of 1796, ch. 67, sec. 13. *Hamilton vs. Craggs*, 6 H. & J. 17; *Burroughs vs. Negro* **392** *Ann*, 4 H. & J. 262; 1 *Thomas' Coke Litt.* 14; 2 *Ib.* 19—22 (*note M*;) 2 *Blk. Com.* 166; *Shep. T.* 129, 130; 2 *Johns. Rep.* 243.

Brewer, Jr. for the appellee, referred to *Co. Litt.* 274 b; 1 *Hen. & Munf.* Act of 1692, ch. 52; 1752, ch. 1.

EARLE, J. delivered the opinion of the Court. This cause was decided in Anne Arundel County Court, upon facts agreed on, and stated between the parties. The statement briefly represents Charles' right to freedom under the will of his deceased master, John W. Beard, and points to and sets out the particular clause by which he claims it. What is the true meaning of the testator in this clause seems to have been the sole question submitted to that Court, and can alone have our attention in revising their decision. We concur with the Judges in thinking that John W. Beard intended that Charles should be a free man on the first day of January, 1827; it could not have been his intention that the condition mentioned, should have been performed by Charles precedent to that day, as the acts to be done consist of payments to be made by him annually, as long as he may live.

Considered as a condition to be performed subsequent to freedom, it presents a question upon which we need not give an opinion, as it is one in which the executor can have no interest.

The subject of assets insisted on in the argument, is not before us, and we shall express no opinion, in relation to it. If it deeply con-

cerns the executor, we can only say, that he understand his situation as to assets, and to the security.

We affirm the judgment of Anne Arundel C

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• BURCH et al. vs. SCOTT.—Decree

A bill was filed in June, 1823, and the usual process issued, which were served on the defendant until March, 1824. He failing to appear, the Court took the bill *pro confesso*, which was also served 1st of May following. The cause was then pronounced in August, 1825, and a *fiery facias* issued, return 1825, at which term the original defendant was interested in the decree, filed a bill to have the decree opened, and an answer of the bill accepted. The grounds of this application were unfounded, that proper parties were not originally defendant had been prevented by the omissions of 1824, and by accident in the transmission of his from putting in his answer as he designed and the Chancellor countermanded the execution, and in controverting this application, rescinded the decree and all proceedings subsequent to July, 1824. The Court of Chancery possesses, to open the decree, which the Court of Chancery possesses, to open the decree, and vacate the decree in this case, for the defendant to make his defence. (a)

A bill of review will only lie for errors apparent on the face of the decree, or for some new matter discovered since the making of the decree itself.

A bill of review for errors apparent must be for errors of the decree itself.

A bill of review cannot be brought without having the decree in some shape. If it be for matter apparent in the decree, then, upon the plea and demurrer of the defendant, the Court judges whether there are any grounds for opening the decree.

If it be for matter come to the plaintiff's knowledge after the decree, then, upon a petition for leave to bring a bill of review, the Court will judge if there be any foundation for such a bill.

Upon a bill of review for error apparent there is no need of an answer and a demurrer.

A bill of review cannot be supported on the ground of error covered since the decree, unless such new matter

be shown.

(a) As to an appeal from the action of the Chancellor, see *Oliver vs. Palmer*, 11 G. & J. 147, citing *Hollingsworth vs. McDonald*, 2 H. & J. 200, note.

(b) Cited in *Tomlinson vs. McKaig*, 5 Gill, 279; *Barry vs. Barry*, 22; *Pfeltz vs. Pfeltz*, *Ibid*, 457.

(c) Approved in *Pfeltz vs. Pfeltz*, 1 Md. Ch. 458; *Barry vs. Barry*, Ch. 292.

before in issue, and unless the leave of the Court be first obtained, which will not be granted without an affidavit that the new matter could not be produced by the party claiming the benefit of it at the time when the decree was made. (d)

A supplemental bill in the nature of a bill of review does not lie after a decree has been enrolled.

A decree is to be considered as enrolled when it is signed by the Chancellor and filed by the register, and the term has elapsed during which it was made. It cannot then, as a general rule, be vacated on petition. (e)

It is within the discretion of the Court to discharge the enrollment and vacate the decree for the purpose of enabling the defendant to make his defence. (f)

APPEAL from the Court of Chancery. On the 14th of June, 1823, the appellants filed their bill against the appellee, upon which an injunction and subpoena issued, and were served to September Term, 1823, when the defendant not appearing, an attachment issued against him, and he was returned attached to December Term, 1823. The attachment was renewed, and the defendant was returned attached to March Term, 1824. On the 30th of March, 1824, an order was passed to take the bill *pro confesso*, &c. A service of this order on the defendant, was proved on the 1st of May, 1824. At March Term, 1825, commissions issued to take testimony, which were returned to July Term, 1825. On the 4th of August, 1825, the case was referred to the auditor, who on the same day made his report, when the Chancellor decreed accordingly. On the 25th of September, the complainants petitioned for a writ of *fiery facias*, to levy the * amount of the sum of money decreed to be paid to them by the defendant, which was thereupon ordered, and issued re- **394** turnable to September Term, 1825. It was renewed to December Term, 1825. Afterwards, and at the same term (December, 1825,) the defendant, with Berry, Gittings and others, filed in the said cause a bill, (stated in the record to be a bill of review,) reciting the substance of the bill of the complainants of the 14th of July, 1823, and the proceedings thereon, and certain proceedings in the Orphans' Court in the District of Columbia, and in Montgomery County, and in the Court of Appeals, between the intestate of the complainants and the intestate of the defendant in their respective lives, and be-

(d) Cited in *Hitch vs. Fenby*, 4 Md. Ch. 191. See *Hollingsworth vs. McDonald*, 2 H. & J. 199, 200.

(e) Cited in *Boteler vs. State*, 8 G. & J. 381; *Nowland vs. Glenn*, 2 Md. Ch. 369; *Ducker vs. Belt*, 3 Md. Ch. 19; *Stewart vs. Beard*, 3 Md. Ch. 228; *Marbury vs. Stonestreet*, 1 Md. 156; *Lovejoy vs. Ireland*, 19 Md. 57; *Thruston vs. Devecmon*, 30 Md. 217; *Waring vs. Turton*, 44 Md. 547; *Downes vs. Friel*, 57 Md. 533. See *Hollingsworth vs. McDonald*, 2 H. & J. 200, note, and *Equity Rules*, 1883, Rule 50.

(f) Approved in *Herbert vs. Rowles*, 30 Md. 280, and *Rust vs. Lynch*, 54 Md. 639. See *Hollingsworth vs. McDonald*, 2 H. & J. 197-201.

tween the intestate of the complainants and the defendant
& J. 67,) and certain proceedings of the defendant as ad-
defendant, after being served with the injunction and t
in this case, (which was before September, 1823,) "lost
apply to his counsel, W. Jones, Esquire, to draw his
pursue the necessary steps to determine the controversy
finally; but that owing to the residence of the couns
State, his not being a regular practitioner of the Court,
ous professional avocations, the said Scott was frequen
trary to his anticipations and expectations, disappointed
the business put in train for a decision. That he at le
so anxious and uneasy on the subject, that hearing of 1
sel being in attendance at the Court of Appeals in Ann
June Term, 1824, he came from his home in Montgome
Annapolis, for the express purpose of having an interv
and getting the answer drawn and filed. That he four
on the eve of returning to Washington, whither he acco
and immediately on their arrival, the answer was dra
larly sworn to, and put into the hands of his couns
mitted by the stage next morning to the register of the
said Scott had frequently interviews afterwards with
the subject, and he, as well as his counsel, took it f
answer and exhibit * had been duly received
395 informed by his counsel, that he had made an
with Mr. Key, one of the opposite counsel, who reside
town, to fix upon some day convenient for them both
poli, and argue the cause. And that said Scott rema
impression without the slightest intimation of the a
miscarried, until he found that there had been a decre
followed by execution. And when he communicated
the facts of his property having been seized by the
utterly at a loss to comprehend how it could have been
having only heard a short time before of the mis
answer, and not dreaming that there could have be
writing to the register of the Court for information,
of the fact." These complainants then by their bil
the decree had been obtained by surprise and fraud
the complainants therein, (the appellants,) and contr
knowledge of right and conscience; that the compla
tings, are the children and distributees of Kins
whose estate the complainant Scott administered; th
trustee, and they the parties really interested, ar
been made parties by the complainants in their bill.
is altogether fraudulent both against Scott and th
much as by fraud and concealment, the appellants c
for more than was due, (if ever any thing was d

sealed set-offs and deductions which they had always admitted; and as against Scott, by like fraud and concealment, having charged him with a sum exceeding what he had received and was accountable for. That Scott's said answer, which by some unforeseen and inevitable accident had miscarried as aforesaid, presented a just and substantial defence, and that the miscarriage and loss of said answer had been discovered and known to Scott since the said decree, and not before, and the other complainants were totally ignorant that Scott had failed to put in his answer. The bill then objects to the order and proceedings of the Chancellor, and the returns and proceedings of the commissioners, and states *certain errors therein for which Scott has brought this his bill, in the nature **396** of a bill of review, to review, revise, &c. and prays for himself and the other complainants, that the said decree and proceedings may be reviewed and reversed, and that the appellants may answer the premises; and that Scott may be allowed to put in his original answer, plea, &c. to said original bill, and the other complainants allowed as well as Scott to appear to the said bill, and answer and defend the same upon the original merits, unprejudiced by said decree; that the said cause may be heard upon all and singular the allegations, matters and things, in this their supplemental bill in the nature of a bill of review alleged and maintained, at the same time that it is reheard upon the said original bill; that the complainants may be restored to their original situation before the decree; that the said decree may be opened for such rehearing; that the execution thereof may be suspended, and the writ of *fieri facias* countermanded; and praying publication against the defendants therein, &c. Accompanying this bill was an affidavit from the counsel, Mr. Jones, stating the drawing of the answer in Washington with a plea in bar and a demurrer to the equity of the original bill which was sworn to and returned to him to be transmitted to the register in Chancery; that finding the package so large as to make the transmission of it by the mail very expensive, he sent his servant to the stage office to inquire whether there were any passengers for Annapolis in the stage of the next day, who returned with the answer that he had found a gentleman who would take charge of the package; upon which he delivered it to his servant, very securely sealed up and directed to the register of the Court of Chancery in Annapolis, with a note requesting him to file the answer, and enter a notice to dissolve the injunction. He does not recollect that the servant named the person to whom he delivered the package; upon questioning him lately, he thinks he did not know his name, and has forgotten it if he did. That he had frequent conversations afterwards with Mr. Key about appointing a day to go to Annapolis and argue the cause, after he had informed him that he had put in the answer. He rested **397** without the least doubt or apprehension of * the answer being

regularly filed, and does not remember when he experienced great surprise as when he heard of the bill and decree.

Upon this bill and affidavit, the Chancellor by his order of November, 1825, suspended and countermanded the execution of all further proceedings under the decree. At December Scott filed an answer to the appellants' original bill with sundry exhibits of certain proceedings of the for- versy, in the life of K. Gittings, in the Orphans' Court trict of Columbia, which it is unnecessary to state. At the next term (March, 1826,) the appellants appeared and answers with sundry exhibits, to the bill of Scott, Bel and others, in which they aver and state the justice of claim, for which the decree had been obtained; the pr the former suit, &c. the justness and fairness of the dec the allegations of the bill, and referring to the proof tal own acknowledgments of the justice of the claim and the money to be paid, whenever the cause should be d the appellants. The answers state the allowance of ce and that they were endorsed on the *fiery facias*, and de of the others claimed by Scott. That the order for tal *pro confesso*, was served on Scott before the 20th o They admit that their counsel was informed, that Scott filed; and that they were informed and believe, their thereupon wrote to Annapolis for a copy of it, and was none was filed, which information he shortly afterwa- cated to Mr. Jones. They charge, that the same fa afterwards, communicated to Mr. Jones, after a conside and they believe was also communicated to Scott. charge, and state they are prepared to prove that S information before the decree. They deny all fraud in decree, and deny that there ought to have been any part of Scott, who is charged as desirous to delay his; as he safely could.

* Afterwards, at the same term, (March, 1826,) the appellants filed their petition, praying the Chancellor to order of suspension of the 16th of November, 1825. They show cause on the 25th of July, 1826, the Chancellor following order.

BLAND, C. (July Term, 1826.) This case standing on the notice given in pursuance of the order of the 16th of last, to show cause why the order of the 16th of should not be dissolved and revoked, the counsel were heard and the proceedings read and considered. The Chancellor feels every disposition to relieve the embarrassing forms, and to reach its merits if practicable; therefore, be necessary to disengage the complain

equity and object, from the forms with which they have been clothed ; and to examine their bill with a due regard to their equity and object. The substance of their complaint is, that a decree has been obtained against some, which materially affects all of them, erroneously—by fraud—by surprise ; or, to say the least, improperly and to the exclusion of a good and available defence. And upon the truth of these allegations they ground their equity to have the decree of the 4th of August last set aside—their defence let in, and the matters in controversy heard upon the merits. This is the object, and the mode chosen by them to attain it is, by what they call “a supplemental bill in the nature of a bill of review.” Whatever may be the cause of complaint, the party asking relief must conform, at least in substance, to prescribed rules as to time and manner.

It has been the long established usage and law of the Court of Chancery to consider all its orders, and decrees, as completely within its control, and open to be altered, revised or revoked, during the whole term at which they are passed, on motion or by petition. But, if the term is suffered to elapse, the party can only obtain relief by bill of review. This law of this Court is analogous to that which has been adopted by the Courts of common law ; and which has been found alike salutary in both. It is believed there is no decision of the Court of Appeals which * has directly or distinctly restricted or altered this rule of the Court of Chancery. But in this case **399** the bill of these plaintiffs was not filed until long after the close of the term at which the decree was signed. It cannot, therefore, be considered as entitled to the same indulgence, or as standing altogether on the footing of a petition for a rehearing, or alteration, or opening of a decree, filed during the term at which the decree was signed.

This bill charges, that the decree of the 4th of August last was obtained by fraud. It is the peculiar province of this Court to grant relief in all cases against fraud and accident, not within the reach of the Courts of common law. And there can be no case, of that description, in which it would be more fit and proper for it to interfere than upon a charge, that its own decree had been obtained by fraud. Such a case is, however, brought before the Court, not by a bill of review, but by an original bill. And in that light, the allegations of this bill, require the Court, in some respects, to consider it.

In the Court of Chancery of England, the Chancellor, it seems, after the hearing, pronounces the substance of his decree orally, minutes of which are taken down by the register, who afterwards draws them out into the form of a decretal order ; and, if in doing so, any mistake should occur, the execution of the order may be stayed awhile ; until it can be corrected by motion in Court. As thus drawn up, this judgment of the Court is always called its “decretal order.” But it has the force only of an interlocutory order ; and is not a perfect, complete, and final decree before enrollment ;

for till then the Chancellor may rehear, alter, or rev proper officer draws up the form of the decree of enrollment decretal order, reciting all the pleadings, &c. after which is made upon parchment and signed by the Chancellor, and not until then, an enrolled and final decree. The time suffered to elapse between the making of the decree and the enrollment, is seldom less than a month, often more, and in some cases exceeds a whole year. But in this interval the order is so far considered as a final decree that it may be by attachment.

400 * The Court of Appeals of this State have declared decree of the Chancellor is subject to his control, on bill of review, or a bill in the nature of a bill of review. review lies after the decree is signed and enrolled. A bill in the nature of a bill of review lies after the decree is made, but before enrollment. A decree must be considered as enrolled, after it is signed by the Chancellor and filed by the register. But the Chancellor rarely, if ever, pronounces his decree orally, as in England. If he does do so in any case, no minutes of it are taken down. He is considered as having pronounced no judgment; nor as having made any decision in the cause until a decree is drawn up in full and proper form and signed by him. That decretal order, which, in England, always precedes the enrolled or final decree, is never made here, and is unknown to our practice. But in the phrase "decretal order," is often applied to various other orders, besides that which immediately precedes the decree; and it is sometimes applied in the same sense here.

The plaintiffs have styled this bill, "their supplemental bill in the nature of a bill of review." But, one of them was the defendant in the original bill; and the others were no parties to the original bill; and it is as an addition, to no other bill; nor does it purport to supply defects of any original bill. It is, therefore, in no sense a supplemental bill.

In England, a bill of review can only come in after the decree has been perfected and enrolled. But if the party discover any new matter of fact after the decree has been pronounced, and before it has been enrolled, he may obtain relief by a bill in the nature of a bill of review; and need not wait or go to the expense of having the decree enrolled. Now; from what the Court of Appeals have seen, it clearly follows, that in this State, there can be such things as a bill in the nature of a bill of review: since all such bills here are made by being signed and filed; and when so made may be considered as decrees enrolled. Most clearly such a bill may be resorted to in this case.

401 A bill of review, properly so-called, lies against those who were parties to the original bill, and against them only. It must be either for error apparent on the face of the decree,

some new matter. But, before a bill of review for newly discovered matter can be filed, the party must petition for leave to do so: setting forth the new matter, strongly sustaining his statement by affidavits; upon which the leave of the Court is granted. In this case there has been no petition setting forth newly discovered matter, nor any leave given to file such a bill. This bill, therefore, can in no respect whatever, be considered as a bill of review grounded on the discovery of new matter.

A bill of review for error apparent on the face of the decree may be filed without asking or obtaining the leave of the Court; and it may be brought by either of the parties to the original bill alone; or it may be filed by a person not a party to the original decree, but whose rights are injured by it. Such is the case now before this Court. The bill of these plaintiffs has this character, and more.

This bill has yet another aspect. It alleges, that the plaintiffs, one of whom was a party to the original suit, had a good and available defence; that all of them should have been made parties; that they have, all of them, an interest which they will be able to maintain and prove; and that the decree of the 4th of August last was obtained by surprise, or owing to a kind of negligence for which they are not at all blamable, or for which they may, at least, be excused. Upon these grounds they pray to have the decree opened and the cause reheard. According to the English authorities, if the enrolment of a decree be obtained by surprise or irregularity, it may be opened; provided, the application be made within reasonable time. And where the merits of the case had not been entered into, an enrolled decree has been set aside, upon the special circumstances, notwithstanding the proceedings were strictly regular. For a Court of justice will make every effort, when in its power, to reach the merits of the case, and have justice done.

This bill, then, divested of all extraneous matter may be regarded in three distinct characters. First, as an original bill to * have the decree of the 4th of August last reversed on the ground **402** of fraud. Secondly, as a bill of review for error apparent on the face of the decree, and because it injuriously affects the interests of some of the complainants who were not parties to it; and Thirdly, as a bill, grounded on the peculiar circumstances, asking to have the decree by default set aside, and the case reheard upon the merits.

It was in these characters, that it presented itself to the mind of the Chancellor when it was first laid before him. He then felt, as he still does, a strong impression, that these characters were so entirely incompatible, as to be incapable of being blended together in the same bill; but he conceived, that if it could be sustained in all, or any of them, the parties complaining would be entitled to relief. And under this impression it seemed to him fit and proper to suspend, at least for a season, the execution of the decree, until those matters could be more carefully canvassed, and both parties could be

heard. And therefore it was, that he passed the order of November last; which operated as an injunction, intended so to operate.

But, in the course of the argument, the one party seemed to treat this order as a total revocation of the decree of August last; and the other, as a mere stay of execution, some credits not having been given. It was also urged, allowing of such a bill of review to be filed, did of itself operate a suspension of all further proceedings, until the final hearing, that it must be so understood, when taken in connection with the prayer of the bill, and the circumstance of a bond having been required and accepted. The Chancellor has been misunderstood.

According to the English law, neither the filing of a petition for rehearing; nor a bill in the nature of a bill of review, nor a bill of review for error apparent on the face of the decree; nor a bill of review for new matter after leave given; nor an original bill to set aside a decree on the ground of fraud; nor a bill to open an order of a decree and let in the merits, has ever or under any circumstance been considered, in itself, as a suspension of the execution of a decree. The party having the decree, in all such cases, is allowed to proceed, unless specially and expressly restrained, which is never done but on the sum decreed being brought in, or on good security being given. Similar law and practice has been long established here; and, hence it was, that the Chancellor required a bond with approved security to be filed, before he imposed the restriction or injunction, expressed in the order of the 16th of November last.

If, on considering this bill in its third character, there should be found sufficient cause for opening the decree, and having reheard upon its merits, it will be most advantageous to all parties that it should be done: and it will be unnecessary to enquire whether it is compatible, whether the three characters of this bill are incompatible; particularly as no objection to it has been taken on that ground; or whether the decree has been obtained by fraud; or is erroneous upon its face. The decree of the 4th of November last, now complained of, was obtained in that suit by the defendant in not filing his answer within the time prescribed by the rules of the Court. This apparent negligence, the present plaintiffs, by their bill, have endeavored to account for—to justify—by excuse. And whether they have done so or not, is the question now to be ascertained; if they have, this decree must be opened.

The decree was signed as of July Term; and, as has been observed before, all decrees and orders of the Court being held subject to its control during the term, if an answer had been filed at any time, previous to the close of that term, the decree would have been set aside, and the defence let in. No decree, under the rule, will be signed until after the first four

the term; but after that an answer may be filed, and the decree rescinded, at any time during the term. On turning to the proceedings in the original case, it appears, that there had been a return against Scott, the defendant, attached for not appearing; in consequence of which, on the 30th of March, 1824, the usual order *nisi* was passed, requiring him to appear and answer by the 4th day of the next July Term, which commenced on the 13th, and
 * closed on the 24th of the same month. Therefore, at any 404
 time after the 17th of July, 1824, the parties might have obtained the decree which was signed on the 4th of August, 1825.

That they did not obtain it sooner can only be imputed to their own misunderstanding, negligence or indulgence; because, the Court, on application, would have inspected the proceedings, and have done on the next day, after that day, precisely that which it did, when called upon one year after. The plaintiffs in that case then, owing to their own negligence or indulgence, stood in no better situation at the July Term, 1825, than they did at the July Term, 1824; because, their decree by default, according to the established practice, was liable to be corrected or revoked during the term at which it was signed. The July Term, 1825, commenced on the 12th of that month, and was not finally closed until the 17th of August following. Consequently, the decree was not final and absolute until that day. After which it could only be opened or affected by an original bill, or a bill of review. The bill to set aside this decree was not filed until the 15th of November, 1825; and Scott, one of the plaintiffs here, was not charged, on the record of the original case, with a default, which might have been fixed upon him by a decree, until the 18th of July, 1824, making a space of about fifteen months of apparent negligence, which is to be accounted for, justified or excused. To find which, we must examine the bill and answer in this case.

That the defendant Scott, in the month of July, 1824, and before he could have been finally fixed with a decree by default, had made an answer, which was ready to be put on file; that he had charged his solicitor with the care of it; who had attempted to forward it to the register, to be put on file, are facts proven and not denied. It also appears, that under a firm belief, that his answer had reached its destination, and was on file, his solicitor proposed to the solicitor of the plaintiffs to agree upon some day when the cause should be argued by them. The defendant, in this case, Thomas Burch, in his answer, states, that thereupon his counsel wrote for a copy of Scott's answer, and was informed that it had not been filed; which information was * shortly afterwards communicated to Scott's
 counsel, which after a considerable interval was again men- 405
 tioned to him. And it is expressly charged, that Scott himself, knew the fact before the decree was signed. That Scott's solicitor was very negligent is most manifest. But it does not clearly appear, that Scott himself, is chargeable with negligence to a greater extent than

about four or five months; for it is not said by Burch how long it was, before the date of the decree, that he informed his answer had not been filed; but it would be the counsel of the plaintiffs in that case, to be assured whether Scott's answer was filed or not, inquired for it, at the papers so late as about the 1st of July, 1825.

It is admitted by the defendants in this case, that the decree of the 4th of August last is for a greater amount than it ought to have been given for; in this respect, therefore, it confessedly requires revision and correction. It is a decree by default, and not upon the merits. But Scott avers upon oath, that he has a good defence against the whole claim of the defendants, which he prays to be let in. And it is not alleged by his opponents, that they have been deprived of any means of sustaining their pretensions. Short, under all the peculiar circumstances of this case, it appears to be fit and proper, that the decree of the 4th of August last should be revoked; but it must be upon the terms of paying all costs.—Decree that the decree of this Court passed and signed on the 4th of August, 1825, in the case wherein Thomas Burch, administrator de bonis non of Jesse Burch, Fielder Burch and others are plaintiffs, against William Scott, together with all the proceedings in the said suit subsequent to the fourth day of July Term, 1824, be revoked, rescinded and annulled.—Decreed also, that the said Scott forthwith pay to the said complainants all the costs which they may have incurred in the prosecution of the said suit subsequent to the fourth day of July Term, 1824, to be taxed by the register.—Decreed also, that the answer of the said Scott, purporting to have been received and filed on the 7th of December, 1825, in the said case, be allowed to be read in his answer in the said suit, subject to all legal exceptions thereto. * From this decree, the complainants in the original suit have appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, M. J., STEPHEN, and ARCHER, JJ.

F. N. Key, for the appellants. The Chancellor has considered the bill of the appellee as having three aspects, under all, or some of which he is entitled to the relief prayed. "First—as an original bill of the decree of the 4th of August, 1825, reversed on the ground of fraud. Secondly—as a bill of review for error apparent on the face of the decree; and because it injuriously affected the interests of some of the complainants who were not parties to it; and Thirdly—as a bill grounded on the peculiar circumstances, to have the decree by default set aside, and the case reheard upon its merits." The Chancellor seems to be chiefly upon this latter ground that the Chancellor seems to have granted the relief.

On the part of the appellants he contended, that considering the bill in all or either of these aspects, this decree is erroneous.

“as an original bill.”—1. The bill itself presents no case for relief; and, 2. If it did, the answer denies every thing that would make it a case for such relief. The answer denies all fraud or surprise, and charges that both Scott and his solicitor were informed of the answers not being on file, some time before the final decree. It also denies the averment of merits as to the original controversy, and exhibits (which is conclusive of that subject) a copy of the decree in the case of Burch against Gittings in the Orphans’ Court of the County of Washington, in the District of Columbia, which was never appealed from, and settled the question of right as to the negroes, which Scott afterwards sold as Gittings’ administrator—the price of which, it was the object of the appellants’ original bill to recover from Scott. The deposition of Brightwell also shows Scott’s own acknowledgment that he had no merits. Considering the bill in this aspect, the Chancellor’s decree is on bill and answer, and the answer was to be taken as true.

Secondly, “as a bill of review for error apparent on the face of the decree; and because it affected the interest of some of the * complainants who were not parties to it.” There is no error **407** on the face of the decree, and none such is pointed out in the bill; also its affecting the interest of some of the complainants who were not parties to it, could not entitle Scott, and much less the others who were not parties, to file a bill of review.

Thirdly, “as a bill grounded on peculiar circumstances,” &c. There can be no such bill; the decree of the 4th of August, 1828, was only subject to the Chancellor’s control, by rehearing, during the term at which it was signed, by a bill in the nature of a bill of review; and after the term, only by a bill of review.

He cited *Cooper’s Plead.* 95, 97, 98; *Hollingsworth vs. M’Donald*, 2 H. & J. 237. The Act of Assembly 1820, ch. 161. sec. 1, 2, 3. *Marine Insurance Company*, 17 Hodgson; 7 Cranch, 336; *Henck vs. Todhunter et al.* 7 H. & J. 278; *Munnikuyson vs. Dorsett*, 2 H. & G. 374; 2 Johns. Dig. 327; *Pinkney vs. Dowson*, 4 Taunt. 779; *Avery vs. Petten*, 7 Johns. Ch. 211; *Cameron vs. M’Roberts*, 3 Wheat. 591.

Jones, for the appellee. * As to a decree in paper, and a decree enrolled. If the decree is enrolled, it may be reversed **408** by a bill of review, or on an appeal, or for new discovered evidence, or error in law. But where the decree is in paper it may be reviewed, revoked, &c. on petition for a rehearing, or by bill of review, &c. A decree is never enrolled until the suit is finally disposed of. Where it is not enrolled it may be opened on motion. The Courts now on all occasions proceed by way of motion—rule to show cause, &c. It is substituted in the place of an *audita querela*, and writ of error *coram nobis*. It has been the practice in our Courts to set aside a judgment after the term has elapsed. *Jackson vs. Union Bank of Maryland*, 6 H. & J. 151, 152, (note;) *Gover et al. Lessee vs. Cooley*, 1 H. & G. 7. It is not the expiration of the term, but the enrollment of the decree. When is

the decree made an unalterable record? So long as the of the decree is suspended, it may be re-examined. V enrollment of a decree? It is a record of the whole proceedings. A judgment enrolled is a record of the whole proceedings. *Newl. Ch. Pr.* 191, sec. 3; *Wiser vs. Blackly* and so also is the enrollment of a decree—not separated *Ch. Rep.* 488. If the decree is enrolled at the end of the term equally so the moment it is filed with the register. No other to be done at the end of the term than when filing the *Bennet vs. Winter*, 2 *Johns. Ch. Rep.* 205. By the Act of 119, sec. 9, no decree, or the proceedings upon which it is founded, is required to be enrolled or recorded, unless it affects estate or brings it into question.

As to the different natures of bills and petitions for rehearing. *Mitf. Plead.* 34, 84, 85; 2 *Madd. Ch.* 464, 465, 537; *Wooster vs. Hull*, 1 *Johns. Ch. Rep.* 539; *Cooper's Plead.* 88, 99; *Ridg. Carey*, 4 *H. & McH.* 167; *Griffith vs. Pennington*, in the late *C. Appeals*, November, 1795, (MS.)

Magruder, in reply, cited *Cooper's Plead.* 88, 90; *Williams vs. Lish*, 1 *Vernon*, 117; *Wiser vs. Blackly*, 2 *Johns. Ch.* 491; *C. Plead.* 96; *Mitf. Plead.* 85; *Newl.* 190; *Wiser vs. Blackly*, 2 *Ch.* 490; *Newl.* 191; *Hollingsworth vs. McDonald*, 2 *H. & J.* 273; *Lyles vs. Lyles*, 6 *H. & J.* 273; *Jackson vs. Union Bank of Mass.* 6 *H. & J.* 151, (note); *Gover et al. Lessee vs. Cooley*, 1 *H. & G.* *Palmyra*, 12 *Wheat.* 8; *Hudson vs. Guestier*, 1 *Cranch*, 1; *Came McRoberts*, 3 *Wheat.* 591; *Hodges vs. Davis*, 4 *Hen. & Mun.* *Contee vs. Cooke*, 2 *H. & J.* 179; *Mitf. Plead.* 47.

Jones, for the appellee, (with the leave of the Court) in answer to some points suggested by the counsel of the appellants in reply, not adverted to in the opening, cited 2 *Madd. Ch.* 539, (2nd Ed.); *son vs. Union Bank*, 6 *H. & J.* 151, note; *Gover vs. Cooley*, 1 *H. & J.* 7; *Hollingsworth vs. McDonald*, 2 *H. & J.* 237; *Snowden vs. L.* 6 *H. & J.* 114; *Thompson vs. McKim*, 6 *H. & J.* 302.

Magruder, for the appellants, in reply to the last argument of counsel for the appellee, referred to *Cooper's Pl.* 85-97; *W. Blackly*, 2 *John. Ch.* 491; *Livingston vs. Hobbs*, 3 *Johns. Ch.* *Cooper's Pl.* 269, 27. It is to be taken for granted that an appeal lies, until this Court reverse their decision in *Munnikhuyson vs. sett*, 2 *H. & G.* 374; and *State vs. Cox*, *Ib.* 379.

423 * STEPHEN, J. delivered the opinion of the Court. Considerable difficulty has been felt in coming to a decision in a case, which involves principles of practice not of very frequent occurrence, and which affect in a high degree, the regular and orderly administration of equitable jurisprudence. It appears by the proceedings in the Court below, and which have been brought up by appeal, that a controversy exists as to the right of property.

tain negroes, or the proceeds for which they have been sold, between the representatives of Jesse Burch, and those of a certain Kinsey Gittings. To recover these proceeds and to have a distribution made among them, the representatives of Burch filed their bill of complaint in the Court of Chancery, on the 14th day of July, 1823, against William Scott, one of the appellees, as the administrator of said Gittings, in which bill they also pray for an injunction, to prevent Scott from paying over, or in any manner parting with the proceeds of sale until the final decree of the Court.

The Judge here referred to the proceedings in the Court of Chancery before set forth, including the decree of the Chancellor, and then continued.

Upon the propriety of this decision this Court are now called upon to decide. As a bill of review to reverse the decree of the Chancellor, for error apparent on the face of the decree, it cannot be available for the complainants. The error which * will reverse a decree upon such a bill must appear in the body of the decree itself. **424** *Wyatt* in his *Practical Register*, page 94, states that a bill of review is to examine and reverse a former decree upon error of law appearing in the body of the decree itself, without averment or further examination of any matter of fact before the decree, or of any matter resting upon record, which might have been had at the time of the decree—so in page 98 of the same book, he states the principle to be that upon a bill of review, the party cannot assign for error, that any of the matters decreed, are contrary to the proofs in the cause; but must shew some error appearing in the body of the decree, or new matter discovered since the decree made. So in *Catterall vs. Purchase*, 1 *Atkyns' Rep.* 290, the Lord Chancellor observed it is true on arguing a demurrer to a bill of review nothing can be read but what appears on the face of the decree, but after the demurrer is overruled, the plaintiffs are at liberty to read bill or answer, or any other evidence, as at a rehearing, the cause being now equally open. To the same effect see *Cooper's Pleadings in Equity*, page 89; *Mitford*, page 178; *Taylor vs. Sharp*, 3 *Peere Williams*, 371—If a decree be obtained and enrolled, so that the cause cannot be reheard upon a petition, there is no remedy but by bill of review, which must be upon error appearing upon the face of the decree, or upon some new matter, as a release, or a receipt discovered since—*Wyatt P. R.* page 98. When a bill of review is brought for error apparent, according to the English practice, the usual method is for the defendant, to put in a plea, and demurrer; a plea of the decree, and a demurrer against opening the enrollment so that in effect a bill of review cannot be brought without having the leave of the Court in some shape; for if it be for matter appearing in the body of the decree, then upon the plea and demurrer of the defendant to the bill the Court judges whether there are any grounds for opening the enrollment; if it be for matter

come to the plaintiffs' knowledge after pronouncing the decree, upon a petition for leave to bring a bill of review, judge if there be any foundation for such leave. *Wyatt's*

425 The defendant generally puts in the usual decree there is no error in the decree. He rarely or unless ordered thereto by the Court, and the demurre down to be argued, the Court proceeds to affirm or decree, and the prevailing party takes the deposit, (a) same page. In the case now before the Court, the defendant thought fit to desert the usual course of proceedings, and the above practice, and have put in their answer instead of a demurre. But upon a bill of review for error apparent on the face of the decree, between an answer, and a demurre has been discovered, whether there be error in the decree. Upon examining the decree in this case, it appears to this Court, that there is any error in the decree on the face, nor can the bill be supported upon the ground of new matter discovered since the decree, because such new matter must prove what was before in issue, and the leave of the Court obtained before a bill of review can be filed on this ground, which the Court will not grant, without an affidavit that the matter could not be produced or used by the party claiming the benefit of it at the time, when the decree was made. No such affidavit is alleged in this case to have been discovered since the decree was made. *Cooper's Plead. in Equity, page 91.* A supplemental bill in the nature of a bill of review, for want of proper parties will not be granted, after a decree has been signed and enrolled. See *Wyatt's Blackly, 2 Johnson N. Y. C. Rep. 488; Cooper's Equity Plead.* where a decree is impeached on the ground of fraud practiced in obtaining it, the fraud must be established by proof, before the propriety of the decree can be investigated, same book, page 97. is nothing in this case by which it can be sustained upon the ground of new matter discovered since the decree, for such new matter already remarked, must be something tending to prove what was in issue between the parties. *Cooper's Equity Plead. page 91.* where either a bill of review or a bill of review before enrollment, in the nature of a bill of review, the leave of the Court must be obtained, which the Court will not grant unless an affidavit that the new matter could not be produced or used by the party claiming the benefit of it, at the time when the decree was made. *Cooper's E. P. pages 91, 92, 93, 94; Wyatt's Chancery P. R. 51.* As to the question, when a decree of the Court of Chancery

(a) A sum formerly deposited in Court as a security, to satisfy damages for delay, if the matter should be found against the party preferred such bill. *Wyatt's P. R. 51. Ed. of 1714.*

State is to be considered and taken as enrolled, we consider it to be clothed with that solemnity, when it is signed by the Chancellor, and filed by the register, and the term has elapsed during which it was made. The only question which remains to be considered is, whether it is consistent with the salutary and wholesome exercise of that sound discretion, which it is admitted the Court possesses upon subjects of this nature, to open or discharge the enrollment and vacate the decree, in this case for the purpose of enabling the defendant to make his defence. Upon full and mature deliberation, we are of opinion that it is not. We consider that the establishment of such a lax principle of practice would be productive of the most deleterious consequences, in the administration of equitable jurisprudence, by the tribunals clothed with the Chancery powers in this State. After being repeatedly in contempt by disregarding the solemn process of the Court, the complainant makes his present application rather with an ill grace. In *Wooster vs. Woodhull*, 1 *Johnson N. Y. C. R.* page 541, the Chancellor says, “the interference of the Court to relieve a party from the consequences of his default must depend upon sound discretion, arising out of the circumstances of the case. There is no general and positive rule on the subject; and Lord Thurlow observed in one case, (*Williams vs. Thompson*, 2 *Bro.* 279,) that if a defendant comes in after a bill has been taken *pro confesso*, upon any reasonable ground of indulgence and pays cost, this Court will attend to his application, if the delay has not been extravagantly long. If the indulgence be great and frequent, there is danger of abuse of the precedent, for the purposes of delay. According to the opinion of Lord Hardwicke as stated in this case, the * question in such cases is, on which side the greatest inconvenience would lie. Testing the propriety of granting 427 the present application by that principle, and but little doubt can exist as to the fate which ought to await it. On the one hand if granted, the complainant might gain an advantage which he has lost by his own repeated contumacy and gross negligence; on the other hand instead of a regular and speedy administration of justice by a prompt and respectful attention to the process and jurisdiction of the Court, they will be disregarded and disobeyed, whenever a respondent could thereby gain an advantage, to the great reproach of the law, and the most serious delay in the judicial dispensations of justice. On these grounds it is conceived, that the Chancellor erred.

Decree reversed.

ALDRIDGE & HIGDON vs. TURNER.—December, 1829.

The endorsement of T. on the promissory note of E. payable to A. as follows:

“I hereby guarantee the ultimate payment of the within note,” is void

for want of consideration; and under the plea of non assumpsit, declaration founded upon that guaranty, the objection to consideration may be taken. (a)

APPEAL from Saint Mary's County Court. This was an assumpsit, brought on the 19th of February, 1825. There was one count in the declaration, which stated "That whereas Charles C. Egerton, Jun. before the making of the promise or undertaking hereinafter mentioned, to wit, on the 21st day of the year 1820, at the Town of Baltimore, in Baltimore County, State of Maryland, to wit, at the county aforesaid, made and gave to the said Andrew Aldridge and Benjamin D. Higdon, by the name of Aldridge and Higdon, of the said note, promised to pay to the said Andrew Aldridge and Benjamin D. Higdon, by the name of Aldridge and Higdon, for \$695.40 for value received, by him the said Charles C. Egerton, Jun. and then and there delivered the said note to the said Benjamin D. and Andrew, whereby, and by reason of the said promise, and by force of the statute in such case made and provided, the said Charles C. Egerton, Jun. became liable to pay the said Andrew and Benjamin D. the said sum of money mentioned in the said note, according to the tenor and effect of the said note thereupon afterwards, to wit, at the county aforesaid, in consideration of the premises and to secure the payment of the said money, in the said note mentioned, to the said Andrew and Benjamin D., he, the "said Josiah Turner, upon himself assumed,

(a) Distinguished in *Nabb vs. Koontz*, 17 Md. 290. Cited in *Berry vs. 4 G. & J. 470*; *Deutsch vs. Bond*, 46 Md. 170. *Ordeman vs. La* Md. 155; *Culbertson vs. Smith*, 52 Md. 634. See *Elder vs. Warfield*, 7 Md. 285, note, and *Wyman vs. Gray*, 7 H. & J. 299, note. In *Nabb vs.* where the defendant endorsed upon a promissory note, at the time of execution, the following: "I hereby guarantee the payment of the note at maturity," it was held that he was liable on this guaranty, and the rule that the consideration of a guaranty must be expressed in writing, does not apply where the written promise of the principal sets forth or imports a consideration, and the undertaking of the guarantor refers to the original indebtedness and is delivered to the creditor at the same time. The Court said: "But it is insisted on the part of the defendant that the case of *Aldridge vs. Turner* is directly in point and must govern the present decision. The cases are substantially the same, as far as the evidence goes; but there is this difference, that in the one cited it appears at what time the guaranty was written on the note, and the facts indicate that it was done after the note had been made and delivered to the plaintiffs, whereas here the evidence shows that the defendant's undertaking was written on a note importing a consideration as the transaction, between the original parties, and accompanied the note of the maker) to the plaintiff, which brings the case within the rule established by the decisions to which reference has been made." *Culbertson vs. Smith*, 52 Md. 628, to the same effect.

the said Andrew and Benjamin D., then and there promised to guarantee the payment of the sum of money mentioned in the note herein before stated, by signing with his own proper hand-writing on the back of the said note the following obligation: 'I hereby guarantee the ultimate payment of the within note. Josiah Turner.' And the said Andrew and Benjamin D. aver that the said Charles C. Egerton, Jun. hath not paid to them the said sum of money, in the said note mentioned, or any part thereof, at any time whatever, but therein hath wholly failed and made default, and is not able to pay; of all which said premises, the said Josiah Turner afterwards had notice at the county aforesaid, and by reason whereof, and according to the said guarantee and undertaking of the said Josiah, in form aforesaid made, he, the said Josiah, became liable to pay to them, the said Andrew and Benjamin D., the said sum of money, in the said note mentioned, when he should be thereunto requested, and being so liable, he, the said Josiah, in consideration thereof," &c.

The defendant pleaded *non assumpsit* and *non assumpsit infra tres annos*. General replication to the last plea, and issues joined.

At the trial of this cause, the plaintiff gave in evidence to the jury the note of Charles C. Egerton, Jun. to the plaintiffs, and the defendants' assumption thereon as follows: "Baltimore, April 21st, 1820, \$685.40. Six months after date, I promise to pay to Aldridge & Higdon, or order, six hundred and eighty-five dollars and forty cents, for value received. Charles C. Egerton, Jun." On the back of the foregoing note were the * following endorsements, to wit: "I hereby guarantee the ultimate payment of the within note. 429 Josiah Turner." "1821, November 7. Received J. Turner & Co's note, at sixty days, for \$106.50." And proved the signatures of said Egerton and Josiah Turner thereon; they also gave in evidence the judgment of Aldridge and Higdon against Charles C. Egerton, Jun., obtained in March, 1824, on this note, and the proceedings thereon, two writs of *fiери facias*, returned *nulla bona*.

The plaintiffs also read in evidence a conveyance from Charles C. Egerton, Jun. to Josiah Turner and Edward Maddox, dated the 6th of February, 1824, reciting that the said Egerton was indebted to Josiah and Philip Turner, on two notes dated, &c., and that they had become security for said Egerton in certain enumerated notes, "and in divers other cases, not at this time to be accurately enumerated and set forth; also, that the said Maddox had become security for the said Egerton, &c. whereby, in consideration of the premises, and of the sum of five dollars," the said Egerton conveyed to the said Turner and Maddox, sundry negro slaves, goods and chattels, &c. in trust for the said Turner and Maddox, to sell and dispose of the said negroes, goods and chattels, &c. and apply the proceeds to the discharge of the debts due as before mentioned, and to indemnify them against suretyships, &c. the said conveyance was duly acknowledged and recorded according to law. Whereupon, the defen-

dant prayed the Court to instruct the jury that the defendant was not entitled to recover, because no liability attached to the defendant in this cause, by the assumption endorsed on the note, there being no consideration mentioned in said note, which instruction the Court gave. The plaintiffs excepted to the verdict and judgment being against them, they appealed to the Court.

The cause was argued before BUCHANAN, C. J., and DORSEY, JJ.

Stonestreet, for the appellants, contended that the defendants' cause of action should have been taken advantage of by demurrer.

430 • A. C. Magruder, for the appellee.

BUCHANAN, C. J. delivered the opinion of the Court. We perceive any error in the opinion of the Court below, and the question given at the trial to the jury, that the plaintiffs were entitled to recover.

The guaranty by Turner, written upon the back of the promissory note, given by Egerton to the plaintiffs, of the ultimate payment of the amount, appearing to be wholly without consideration, is clearly *nudum pactum* and void; and the plea of *non assumpsit* was filed by the defendant to the declaration founded upon the guaranty, properly let in the objection of the want of consideration. Judgment against the plaintiffs.

TURNER, Adm'r of WILDER vs. ANN EGERTON.—December 1881

The value of property delivered by an administrator to a distributee in payment of his portion of a deceased's estate, cannot be recovered in a Court of law, in consequence of such administrator being afterwards compelled by a recovery at law, to pay a debt due to the deceased, of which he was not aware when he distributed the property. His having in part paid the debts of the deceased, out of his own funds. The remedy for such claims is in a Court of equity. (Cited in *Turner vs. Egerton*.) It is not universally true, that where one is benefited by the payment of money by another, the law raises an assumpsit against the payor. If the payment is made in favor of the party paying the money. A stranger cannot sue. It is not pleasure make me his debtor, whether I will or not, by paying the money due from me to another.

Where one is compelled to pay the debt of another, he may recover from him in an action for money paid, upon the promise which the payment implies, as in the case of money paid by a surety in a bond.

(a) Cited in *Coates vs. Mackie*, 43 Md. 128. 376.

Cf. *Zollickoffer vs. Se*

considered as paid to the use of the principal, and may be recovered in an action against him for money paid. (b)

APPEAL from Saint Mary's County Court. This was an action of assumpsit, brought by the appellant, the plaintiff below, against the appellee. The declaration contained five counts, one for matters properly chargeable in account, for * money laid out and expended, for money lent and advanced, for money had and received, and on an *insimul computassent*. The defendant pleaded *non assumpsit* and issue was joined. 431

At the trial the plaintiff offered in evidence to the jury, and proved by competent testimony, that Edward Wilder, as administrator of James Egerton, paid over to Ann Egerton, the defendant, property (belonging to the estate of his intestate, James Egerton, and with which he had charged himself in the inventory of the deceased estate) amounting by the appraisement to the sum of \$791.47, in February of the year 1812, and that he had paid over a like amount of property to the other distributees. He also proved that the said James Egerton left at his death six children, his only heirs and distributees of his personal estate, all of whom are now living, and that Ann Egerton, the defendant, is one of them; he also gave in evidence to the jury the inventory and six accounts, exhibited and passed in the Orphans' Court of said county by Edward Wilder as administrator aforesaid. The inventory referred to was returned and proved on the 12th of June, 1811, amounting to \$9,348.96. The first account passed by said Edward Wilder on the 2d of June, 1812, charged him with the amount of the inventory and cash received from sundry persons, the whole amounting to \$11,385.66, credited him with payments and disbursements amounting to \$104.64, leaving a balance due of \$10,342.01; the second account left a balance due of \$10,154.70; the third account left a balance due of \$7,285.89; the fourth account left a balance due of \$500.36; the fifth account left a balance due of \$2,095.18, and the sixth account left a balance due of \$1,503.80. He also proved that a large debt was recovered by judgment of St. Mary's County Court, against the said Edward Wilder, as administrator of James Egerton, which he did not expect would be recovered at the time he made a distribution of the assets among the distributees as aforesaid, and which judgment was paid by him; he also proved that the debts were in part paid by Wilder from his private funds, for the reimbursement of which, this action is brought; upon this proof the defendant then prayed the Court to instruct the * jury, that under the pleadings and evidence in this cause, the plaintiff was not entitled to recover, which instruction the Court gave. The plaintiff excepted, and the verdict and judgment being for the defendant, the plaintiff appealed to this Court. 432

(b) Cited in *Myers vs. Smith*, 27 Md. 112.

The cause was argued before BUCHANAN, C. J., EARLE, J., and DORSEY, JJ.

Stonestreet, for the appellant, contended : 1. That the Court erred in giving an instruction against the plaintiff, upon the prayer, that upon the pleadings and evidence, he was not entitled to recover. The particular objection should have been stated. 1825, ch. 117.

2. The plaintiff having proved an over-payment might recover back in this form of action.

C. Dorsey, for the appellee, insisted that an action at law could not be sustained against a legatee or distributee for money so paid him by an executor or administrator. 2 *Fonbl.* 376. (Ed. 1820.)

BUCHANAN, C. J. delivered the opinion of the Court. This is the case of an administrator who, thinking he has paid off all the debts of the deceased, delivered over to the children of the deceased the proportions of the residue of the personal estate to which they were respectively supposed to be entitled as distributees. But being afterwards compelled by a recovery at law to pay a considerable debt due by the deceased, of which he was not at the time aware, and having in part paid the debts of the deceased out of his own private funds, he brought his suit against one of the distributees to recover a just proportion of the amount so recovered against and paid by him. The accounts in the declaration for matters proper chargeable in an action for money lent and advanced, money had and received, and on account *mul computassent*, are entirely out of the question, there being no evidence in the cause in any manner or sense applicable to either of them; and the question is, whether, under the circumstances, if the debt is closed, the plaintiff is entitled to recover on the count for money paid out and expended.

433 *It has been urged, that where one is benefited by the payment of money by another, the law raises an assumption against the party benefited, in favor of the party paying the debt, but the universality of that proposition is not admitted. A man cannot at his pleasure make me his debtor, whether I will or no, by paying a debt due from me to another. Such a payment is not ordinarily deemed to be for my benefit, yet the law does not in a case raise an assumpsit. If it were so, it would be to put a man who owed a debt at the mercy of an enemy, who might choose to make himself his creditor without his consent or authority, for the purpose of harassing and distressing him: and to deprive him of defences which he might have had to a suit by his original creditor, but of which he would not be able to avail himself, against a newly created liability. It is true that where one is compelled to pay the debt of another, he may recover against him in an action for money paid, &c. upon the promise which the law implies, as

case of money paid by a surety in a bond, which is considered as paid to the use of the principal, and may be recovered in an action against him for money paid, &c. But that is not this case. Here was no debt due from the distributee to the creditor of the intestate, no demand which could have been enforced at law against her; and the money paid by the plaintiff, thought not voluntarily, but under a recovery against him in a suit at law, was in discharge of his own liability as administrator, and not of a debt due from the distributee nor on account of his being placed in a situation of responsibility by any act of hers. It was not therefore a payment of money to her use, for which the law will raise an implied promise of repayment, on account of there being in her hands a portion of the personal assets of the intestate. If in such a case as this, an action of law could be maintained on the ground of an implied assumpsit, it would be in the power of fraudulent or negligent executors and administrators, by covinously or carelessly suffering judgments to go against them, and constituting themselves creditors of legatees, and distributees without their knowledge or authority, so to change their predicament against their consent, as in suits *at law instituted upon such implied promises, to deprive them of the benefit of **434** defences, that might be accorded to them in proceedings in Chancery against the funds in their hands, by the original creditors of the deceased, which would be of mischievous consequence to legatees and distributees. And it would be unjust to permit an executor or administrator, by thus constituting a legatee or distributee his debtor, without his consent or knowledge, to place him in a worse situation in relation to that debt than he stood in before; which would be the case if he could pursue him for the recovery of it, on an implied assumpsit, in a Court of law instead of a Court of equity, where alone he could have been called upon before, where equity is administered, in a manner, in which it cannot be in a Court of law. A Court of law not being a fit tribunal to investigate and unravel accounts of executors and administrators, and not being so constituted as to be able, to take into consideration, in the manner that a Court of equity would, how the funds were in fact appropriated, and the mode in which they might, and ought to have been applied. With this view of the subject, we think with the Court below, that the plaintiff is not entitled to recover, and that in bringing his action in a Court of law he mistook his tribunal, and ought to have sought his remedy in a Court of equity, where matters of the kind are properly cognizable, and the interests of all parties equally protected.

Judgment affirmed.

TURNER, Adm'r of WILDER vs. EGERTON.—December

An action at law cannot be maintained to recover back a payment made by an administrator to the guardian of a distributee of an intestate. The remedy is in equity.

APPEAL from Saint Mary's County Court. This was an assumpsit, brought by the appellant against the appellee, the guardian of E. Egerton. The declaration contained a count in matters and articles properly chargeable in account, the counts, and a count on an *insimul computassent*. Plea non assumpsit and issue.

435 * The facts of this were similar to those of the previous case, with the addition here that the guardian, the defendant, had received a payment in money from Wilder, as administrator of James Egerton, on account of his ward, who was a distributee of James Egerton.

The defendant prayed the Court to instruct the jury, that the plaintiff was not entitled to recover for the following reason: that the plaintiff had proved that the payment to the guardian was in specific property, negroes, &c.; as in the receipt specified in the pleadings, therefore he could not support this action upon the pleadings. The defendant for the recovery of the money, which instruction the Court gave, the plaintiff excepted. And the verdict and judgment being against him, he appealed to the Court of Appeals.

The case was argued before BUCHANAN, C. J., EARLE and SEY, JJ.

Stonestreet, for the appellant. C. Dorsey, for the appellee.

BUCHANAN, C. J. delivered the opinion of the Court. This case does not materially differ from that just decided, between the plaintiff and Ann Egerton, and must be governed by the same principles. There the supposed proportion of the personal assets of the deceased were delivered over to the distributee in specific property, and in this case the administrator settled up with the guardian one of the children of his intestate, for the proportion to which the ward was supposed to be entitled as a distributee, and the administrator was brought to recover back proportionate parts of the same due by the intestate, which the administrator was compelled to do by a recovery against him at law, after he had made distribution of the assets.

The evidence of the settlement with the guardian is a receipt, which it appears that he received a part of his ward's support

portion of the estate in money, and the residue in * specific property. And there being in the declaration in this case, a **436** count for money had and received, it was urged in argument, that under that count, the plaintiff would be entitled to recover on account of the money paid to the guardian, which it was supposed distinguished it from the other case, where no money was paid to the distributee, but specific property only delivered over.

But there is no foundation for such a distinction. If where an executor or administrator has delivered over specific articles of property to a distributee, and is afterwards made to pay debts due by the deceased, the law will not raise an assumpsit, on which an action can be maintained against the distributee for money paid; there is no reason, why an action at law for money had and received, should be sustained, where money has been paid to a distributee in lieu of the specific articles of property.

The inconvenience and mischief to distributees would be the same in both cases, and the reasons why a Court of law should not entertain an action, but the party be put to seek his remedy in Chancery, apply as well to one case as to the other. In *Johnson vs. Johnson*, 3 Bos. & Pull. 169, it is treated as settled, that if an executor thinking he has paid off the debts of his testator, pays the legacies, he cannot maintain an action in the Court of common law, for money had and received against a legatee, but must seek his remedy in equity. The same principle applies to the case of a distributee; and the circumstance that in this case the money was paid to the guardian of the distributee, and not to the distributee himself, can make no difference.

Judgment affirmed.

* HALKERSTONE'S Executor *vs.* HAWKINS.—December, 1829. **437**

In an action upon a bond, with condition that the obligor, the defendant, should exhibit all the papers concerning and touching the estate of the late W. deceased, to B. mutually appointed by the obligor and obligee to settle said estate, issue was joined upon a replication, which assigned as a breach, the failure to exhibit such papers. *Held*, that it was competent for the plaintiff to offer in evidence, an inventory of W's personal estate, returned by the defendant as his administrator to the Orphans' Court, it being a paper concerning the estate of W. necessary to its settlement, one which by the condition of the defendant's bond, should have been exhibited to B. and proper to enable the jury to ascertain the amount of damages to be awarded to the plaintiff.

APPEAL from Charles County Court. This was an action of debt, brought by the appellant as executrix of Robert Halkerstone against the appellee, on a bond to the said Robert, in the penalty of £200, dated on the 10th of June, 1812, with the following condition: "The condition of the above obligation is such, that if the above bound

Samuel Hawkins, his heirs, executors, administrators, shall exhibit all the papers concerning and touching the late William Halkerstone, deceased, to Humphrey Barnes, Esq. who is mutually appointed by the above parties to settle and strike a balance, if any, and also pay or cause to be paid such balance, if any, to the above Robert Halkerstone, his heirs or assigns, that then the above obligation to be void, else to be in full force and virtue in law." Signed, "Samuel Hawkins." The defendant pleaded *non est factum*, and general issue joined to the first plea, and replication, denying the papers mentioned in the condition of the bond. Rejoinder, performance, and issue joined.

At the trial, the plaintiff offered in evidence to the jury a inventory of the personal estate of William Halkerstone, returned and recorded in the Orphans' Court of Charleston. Samuel Hawkins, the administrator, to the admission of the testimony the defendant objected, and the Court sustained the objection, and refused to let the said inventory be read. The plaintiff excepted. The Court then instructed the jury that the plaintiff having failed to give testimony of the amount of the damages, the jury would give a verdict for nominal damages; the plaintiff excepted, and the verdict and judgment were for nominal damages, the plaintiff appealed to the Appeals.

The cause was argued before BUCHANAN, C. J., EASELY, J.J.

Stonestreet, for the appellant.

C. Dorsey, for the appellee, cited *Gaines vs. Griffith* (note.)

BUCHANAN, C. J. delivered the opinion of the Court. The condition of the bond on which this suit was instituted is, that the defendant, his executors, &c. "shall exhibit all the papers concerning and touching the estate of the late William Halkerstone, deceased, to Humphrey Barnes, Esq. who is mutually appointed by the above parties, to settle said estate, and strike a balance, and shall also pay or cause to be paid such balance, if any, to the above Robert Halkerstone, his heirs or assigns," &c.

The plea is a plea of general performance. The replication is as a breach of the condition of the bond, that Hawkins did not exhibit all the papers concerning and touching the estate of William Halkerstone, deceased, to Humphrey Barnes, Esq. previous to the impetration of the writ, although he did so &c. pursuing the terms of the condition, to which they objected by the defendant, that he did exhibit all the papers

touching the estate of William Halkerstone, deceased, to Humphrey Barnes, previous to the impetration of the writ, &c. and issue.

In this state of the pleadings, the parties went to trial, when the plaintiff offered in evidence to the jury, the inventory of the personal estate of William Halkerstone, deceased, which had been returned by the defendant, the administrator, and was recorded in the Orphans' Court of Charles County, amounting to five hundred and thirty-four pounds nineteen shillings and * six pence, which was objected to by the counsel for the defendant and rejected **439** by the Court as inadmissible.

It does not appear why this paper was not permitted to go to the jury, it was made out and returned by the defendant himself to the proper office, it is a paper concerning and touching the estate of William Halkerstone, deceased, necessary to the settlement of that estate, and one which by the condition of the defendant's bond, should have been exhibited to Humphrey Barnes.

The issue joined by the parties in the pleadings presented to the jury the question, whether the defendant had exhibited to Humphrey Barnes all the papers concerning and touching the estate of William Halkerstone, deceased; the affirmative of which issue being held by the defendant, the burden of proof was imposed upon him; and in the absence of proof to sustain the issue on his part, it became necessary for the plaintiff, whose suit was brought for the recovery of damages sustained by reason of the breach assigned in the replication of the condition of the bond, to offer such evidence to the jury as would enable them to ascertain the amount of damages that he was entitled to recover.

And as the amount of the personal estate of William Halkerstone, deceased, which had not been settled up, (to procure the settlement of which was the object of the bond,) was necessary to be shown in order to arrive at the damages proper to be recovered, the inventory regularly returned by the defendant himself, the administrator, would seem to have been not only an important, but an essential link in the chain of evidence necessary to the ascertainment of that amount.

It did not lay in the mouth of the defendant who as administrator, had himself prepared and returned it under the requisite sanctions to the proper office, to object to the admissibility of it, and perceiving no reason why it should have been rejected. We think the Court below erred in not suffering it to go to the jury, and that having thus thrown out important testimony offered by the plaintiff, for the purpose of showing the damages sustained, and which was pertinent to the issue joined in the * cause; that Court also erred in instructing the jury, "that the plaintiff having failed to **440** give testimony to prove the amount of damage, they could only give a verdict for nominal damages."

Judgment reversed, and procedendo awarded.

DYER *vs.* DORSEY AND EDELEN.—December, 1829.

In an action upon agreement, by which, after reciting that D. had sold to W. tracts or parcels of land, sold by A. to C. and R. and by their agents sold to D. and for which D. had executed a deed to W.; D. covenanted with W. that a deed should be executed to him, conveying to him the said lands of C. and R. by a given day, and to that. bound himself in a certain penalty;—such penalty cannot be recovered as liquidated damages, it was only intended by the parties as a security for the faithful performance of the contract. (a)

In this case, the sum of money which it might be necessary to pay, for obtaining the title of C. and R. would furnish the true measure of damages, for a breach of D's covenant, the proof of which sum was on the plaintiff; and it appearing that the plaintiff had not paid D. the whole of the purchase money for the said lands, the jury were properly instructed that in estimating the amount of damages, they should, under the Act of 1785, ch. 46, sec. 7; deduct whatever sum of money remained in the hands of the plaintiff on account of said purchase. (b)

APPEAL from Charles County Court. This was an action of covenant, brought on the 2d of February, 1824, by the appellant, (the plaintiff in the County Court) against the appellees, the defendants in that Court, on the following agreement, to wit: C. Dorsey having sold to William C. Dyer, tracts or parcels of land, sold by Henry Anderson to Campbell and Ritchie, and by their agent, Henry H. Chapman, sold to C. Dorsey, and for which lands the said Dorsey has executed a deed to the said William C. Dyer. Now we hereby covenant and bind ourselves to the said Dyer, that a deed shall be executed to the said Dyer, conveying to him the said lands during the month of August, of Campbell and Ritchie, and to this we bind ourselves in the penalty of two thousand dollars. Witness our hands and seals this eleventh of June, 1822.

441 * The breach laid in the declaration was, that the defendants had not executed, or caused to be executed to the plaintiff, a conveyance of the title of Campbell and Ritchie, at the time mentioned for that purpose in the said agreement, before or since; but that they had wholly neglected, and refused so to do. The defendants pleaded *non infregit conventionem*. Issue joined.

At the trial the plaintiff read in evidence, the covenant on which this action was brought, which the defendants admitted was signed and sealed by them. He then read in evidence the following agreement: "Memorandum of an agreement, entered into on this 26th day of April, 1822, between Clement Dorsey, of Saint Mary's County, and

(a) Cited in *Rawlings vs. Adams*, 7 Md. 49. See note (b).

(b) Approved in *Warfield vs. Booth*, 33 Md. 74, and *Land Society vs. Smith*, 54 Md. 208. See *Cannell vs. McLean*, 6 H. & J. 244, and *Ins. Co. vs. McFadon*, 4 H. & J. 20.

William C. Dyer of the other part; the said Dorsey covenants and agrees to sell the said Dyer the land which he bought of Henry H. Chapman, and which was conveyed to him by Henry Anderson, and to give him possession thereof at Christmas next, for which the said Dyer covenants to pay him twenty-five hundred dollars; if the said Dorsey request it, the said Dyer is to pay him one thousand dollars when called on, and the residue at Christmas next; the said Dorsey stipulates to give the said Dyer a good and legal title to the same in fee simple, with a general warranty; the said Dorsey has the use of the same this year, but is not to cut wood or timber therefrom, and is to permit the said Dyer to seed thereon; the said sum of one thousand dollars is not to be paid till the deed is executed to the said Dyer. In witness whereof," &c. He then gave in evidence to the jury, that he had paid C. Dorsey, one of the defendants, the sum of fifteen hundred dollars. The defendants then proved, that the plaintiff had held possession of the land in question, since the original purchase up to this time, and gave evidence that the plaintiff admitted that he owed the defendant Dorsey, upwards of one thousand dollars, for the land purchased of the said Dorsey, of which the plaintiff has had uninterrupted possession to this time. The plaintiff then prayed the Court to instruct the jury, that from the pleadings and the evidence in this cause, the plaintiff was entitled to recover the penalty of two thousand dollars, in the said agreement mentioned, upon which the action is brought, which * opinion and direction the Court refused to give, but were of opinion, and so instructed the jury, that the sum of money which it might be necessary to pay for the obtaining of the title of Campbell and Ritchie, would furnish the true measure of damages in this case, and that the proof of that fact was upon the plaintiff. They further instructed the jury that in estimating the amount of damages in this case, they should deduct whatever sum of money remained in the hands of the plaintiff, on account of the purchase made by him of Clement Dorsey the defendant; the plaintiff excepted, and the verdict and judgment being but for nominal damages, he appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, ARCHER, and DORSEY, JJ.

Stonestreet, for the appellant, referred to *Cannell vs. M'Lean*, 6 *H. & J.* 297.

C. Dorsey, for the appellees, referred to the Act of 1785, ch. 80, sec. 13. He contended that the case in 6 *H. & J.* was not applicable, as the party there was not in possession of the land.

ARCHER, J. delivered the opinion of the Court. The penalty cannot be recovered in this case as liquidated damages. It was only intended by the parties as a security for the faithful performance of the contract.

The value of the land at the time of the breach ought not, as has been contended, to constitute the measure of damages, for such a rule applied here, would work this injustice to the plaintiff would obtain the value of the land, and would hold Dorsey's right and title, having obtained a conveyance of the same, and would be left in possession of the land. Since the precise nature and character does not distinctly appear, it is not clear that their original proprietor, who sold them to Campbell and Ritchie, and Chapman the agent of Campbell and Ritchie, Dorsey. The right, whatever it was, which Dorsey conveyed by deed to the plaintiff under these contracts, was conveyed by deed to the plaintiff. These facts shew how essentially this case varies from *Cannell vs. M'Lean*, 6 H. & J. 297. The rule laid down below, as to the measure of damages, is the correct rule to this controversy. It completely secures the plaintiff against the defendant's breach of the contract, and concurs with the Court below in the opinion by them expressed. The *onus* of proof in this respect, lies upon the plaintiff, and the plaintiff must always be prepared with proof to shew that the injury he may have sustained, by the breach of any contract, can be entitled to recover his measure of damages.

We perceive no error in the direction which the Court gives, that they ought to deduct from the damages the sum of whatever sum of money remained in the hands of the plaintiff on account of the purchase made by him of Dorsey. The Court in this opinion, is maintained and settled by the Appeals, in the case of *The Baltimore Insurance Company vs. The Baltimore Insurance Company*, 4 H. & J. 31, in which the Court have given a decision, 4 H. & J. 31, in which the Court have given a decision, the Act of 1785, ch. 46, sec. 7, in the relation to set-off.

Judgm

CLARKE vs. BELMEAR.—December, 1829

A return by the sheriff to a writ of *fieri facias* , that he had levied on a tract of land called B. supposed to contain, &c." is quashed on motion, and unavailable in ejectment. (a)

A purchaser at a sheriff's sale is entitled to the benefit of the return, both to the *fieri facias* , and *venditioni exponas* , description of the subject levied on, according to the return, under the first writ, is defective, it may be amended and

(a) Approved in *Langley vs. Jones*, 38 Md. 177. See *Williamson vs. Jones*, 1 H. & J. 273.

tain, by the return of the sheriff's proceedings, under the second writ.
(b)

So a levy under a *fiery facias* which is defective in the description of the property levied on, may be amended by the sheriff's return of the property sold * under such writ, the return of the sale describing the property with sufficient certainty. **444**

A purchaser under a judicial sale has a right to resort to the whole judicial proceedings, under which his title accrued, to ascertain it.

The right of a party to obtain a writ of *habere facias possessionem*, under the Act of 1825, ch. 108, does not relate to the time the execution was issued, but to the time when the lands were sold.

APPEAL from Prince George's County Court. This was a motion to quash a writ of *fiery facias*, and a writ of *venditioni exponas*, and the returns, &c.

On the 5th of December, 1822, a *fiery facias* issued out of Prince George's County Court, on a judgment rendered in the said Court in favor of William Holmes against Walter S. Clarke, to which, at the return day, the sheriff made the following return: "laid as per schedule, and not sold for want of time,"—the schedule returned stated, that he had taken part of Burgess' Delight, part of Clarke's Fancy and part of Hickory Thicket, suppose to contain two hundred and seventy-five acres. A writ of *venditioni exponas*, thereupon issued, commanding the sheriff to sell this property, which he returned "not sold for want of time." *Alias* writs of *vendi. ex.* where issued, the last of which was returnable to October Term, 1825, of said Court to which similar returns were made. On the 13th of January, 1826, another writ issued, returnable to April Term, 1826, to which the late sheriff made the following return, "made to the amount of five hundred dollars by a sale of the land in the schedule contained to Francis Belmear on the 17th of June, 1826, the said lands consisting of part of a tract called Hickory Thicket, part of a tract called Clarke's Fancy, and part of a tract called Burgess' Delight, lying and being in Prince George's County; and beginning for the whole, at or near a stone near the main road that leads to the mill now occupied by Jacob Wheeler, thence a southerly course, so as to include the dwelling-house lately occupied by Philip Green, and the orchard contiguous thereto, bounded on the south by a line drawn easterly to Patuxent River, then bounding on the said river, to the extent of said land, on the north with said land, to the beginning,

(b) Approved in *Estep vs. Weems*, 6 G. & J. 307; *Wright vs. Orell*, 19 Md. 155; *Busey vs. Tuck*, 47 Md. 175. Distinguished in *Waters vs. Duvall*, 11 G. & J. 48. Examined in *Langley vs. Jones*, 33 Md. 178. Cited in *Nelson vs. Turner*, 2 Md. Ch. 76, and *Mannahan vs. Sammon*, 3 Md. 472. In the latter case it is said that a *vendi.* confers no power on a sheriff that he did not possess under the *fi. fa.* The former only commands and requires him to do what he could have done under the latter. The *fi. fa.* is the effective writ.

445 containing two * hundred and seventy-five acres, more or less, being the whole of the said several tracts, of which the defendant, Walter S. Clarke, was in possession, at the time of the sale, and the whole of his right, title and interest, in and to the same, being by the aforesaid sale transferred by me to the said Francis Belmear, by whom one hundred dollars was paid to William Holmes the plaintiff in the judgment at the time, and the balance paid to me by said Belmear. Thomas Osbourne, Sheriff." And the said Thomas Osbourne at the time of making said return, filed in Court here with the said writ, the following schedule, to wit: "A schedule of the property of Walter S. Clarke, taken by virtue of an execution issued out of Prince George's County Court, at the suit of William Holmes, the property, to wit, part of a tract of land by name Burgess' Delight, and part of a tract of land called Hickory Thicket and Clarke's Fancy, lying in Prince George's County, containing two hundred and seventy-five acres, and appraised at ten dollars per acre. Two thousand seven hundred and fifty dollars. Nathan Waters, seal. Samuel Waters, seal. Appraised this 17th day June, 1826. Sworn appraisers."

At April Term of said Court, 1827, Francis Belmear the purchaser, moved the Court for a writ of *habere facias possessionem*, to put him in possession of the property so by him purchased, which was accordingly ordered, and issued returnable to October Term, 1827, when the sheriff returned "possession delivered," which said writ at that term was on the motion of said Clarke quashed by the County Court, in consequence of not describing with sufficient certainty the lands, of which possession was to be delivered, the said Walter S. Clarke then moved the Court, that said writs of *fieri facias*, and *venditioni exponas*, and the returns thereto be quashed, and at the same time filed the following reasons: 1. For that the description of the lands in the said writs and returns is uncertain, and consequently the executions are void. 2. Because the description of the lands in the return of the *fi. fa.* which was first sued out in this cause, upon which return, the *v. e.* is predicated, is uncertain, and the writ aforesaid consequently void.

446 * This motion was overruled by the County Court, and a second *habere facias* ordered.

The defendant Clarke appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, ARCHER, and DORSEY, JJ.

A. C. Magruder and J. Forrest, for the appellant, contended: 1. That the *fieri facias* was void for uncertainty, and that the Court erred in adjudging a second writ of possession to be issued. 2. That the Court erred, because the Act of Assembly upon which the writ of *habere facias possessionem* issued, was not in force, when the levy under the *fieri facias* was made, nor when the writ of *venditioni exponas* issued, and it would be giving an *ex post facto* operation to

the law to make it applicable to cases of property already taken in execution. 3. Because the sale was made after the return day of the writ of *venditioni exponas*. On the first point they referred to *Underhill vs. Devereaux*, 2 Saund. 69 a, (note 2;) *Pullen vs. Purbeck*, 12 Mod. 355; *Williamson vs. Perkins*, 1 H. & J. 449; *Hammond vs. Norris*, 2 H. & J. 147; *Berry vs. Nicholls*, *Ib.* 508; *Fitzhugh vs. Hellen*, 3 H. & J. 206; *Thomas vs. Turvey*, 1 H. & G. 435; *Fenwick vs. Floyd*, *Ib.* 172. On the 3d point they referred to *Barney vs. Patterson*, 6 H. & J. 182.

Stonestreet and *J. Johnson*, for the appellee. The sale took place on the 17th of June, 1826, and the writ of *habere facias possessionem*, under the Act of 1825, ch. 103, was moved for, and ordered at April Term, 1827, returnable to October Term, 1827. The Act of 1825 gives the party one entire term, and four days of the succeeding term, to show cause against the issuing of the *habere facias*. This time expired before the writ was ordered. The Act of 1825 says nothing about the time the issuing of the writ under which the sale is made. If the sale is made after the passage of the law, the purchaser is entitled to his *habere*, by the express terms of the statute; although the writ under which it may be effected is * sued previously. 447 On the first point, they contended, that the *fieri facias*, and their return thereto, the several writs of *venditioni exponas*, and their returns, should be connected together, and so considered they present a perfect levy and sale, and the lands sold are sufficiently described. In *Thomas vs. Turvey*, 1 H. & G. 435, one of the schedules described the land correctly, and it was adjudged sufficient to cure the defects of the rest. It is the sale and not the return which transfers the title. 6 H. & J. 182. The return is only useful as evidence of the sale, and may be dispensed with if there be a note or memorandum in writing—the sheriff may correct his return if he ask leave to do so in due time. *Berry vs. Griffith*, 2 H. & G. 337. But it is too late now to move to set aside the return to the *fieri facias*, if it is defective—the application should have been made immediately upon its return, or at all events upon the return of the first *venditioni exponas*. *Dand vs. Barnes*, 1 Serg. & Low. 291, (6 Taunt.); *Fletcher vs. Wells*, *Ib.* 352, (6 Taunt. 191.) Four years intervened between the issuing of the *fieri facias* and the *venditioni exponas* under which the sale was made, and eighteen months between the sale and the present motion. The County Court at April Term, 1827, by ordering the *habere*, adjudged the sale and returns valid, it was therefore too late at the ensuing October Term to bring the same question before them, they could not interfere with a judgment pronounced by them at a preceding term. *Jacob L. D. tit. Term*, 212; *Munnikuysen vs. Dorsett*, 2 H. & G. 374.

MARTIN, J. delivered the opinion of the Court. After recapitulating the facts as set out in the commencement of the report of this

case, the Judge proceeded to state, that from these 1 has appealed and contends, 1st. That the writs of *renditioni exponas* and the returns made to them are tainty; and 2dly. If they are sufficient, Belmear wa the writ of *habere facias possessionem* under the Act lands were in execution prior to the passage of that

* The description of the property contained 448 returned by the sheriff to the *feri facias* was, gess' Delight, part of Clarke's Fancy, and part of His supposed to contain 275 acres." Did the case rest up alone, we should not consider it open for discussion. solemnly determined by many adjudications of this Co a return is not sufficient, that it would be quashed on would be unavailable in an ejectment to prove title in Williamson vs. Perkins, 1 H. & J. 449; Hammond vs. N J. 147; Fitzhugh vs. Hellen, 3 H. & J. 206; Fenwick vs & G. 172; Thomas vs. Turvey, 2 H. & G. 435.

But it does not rest upon this return alone; the sh returned he had not sold the lands under the *feri facias* time, a *renditioni exponas* was issued, commanding him lands before taken by him, under the *feri facias*,—to th he makes a special return, stating in substance, that he lands before taken in execution, under the *feri facias*, giv tion of those lands by metes and bounds, and that Fran became the purchaser for \$500, which sum had been pa The question then arises, whether the purchaser is not the benefit of both those returns to shew the description he had purchased under them? This was a judicial sa purchaser claims title under the whole proceedings, eml writs and returns. The *feri facias* is the effective w cases, it not only authorizes the sheriff to seize, but to s ferent is the office of a *renditioni exponas*. That cou power to the sheriff; it does not authorize him to do an he might not have done under the *feri facias*. It is on tory writ, and directs him to carry the *feri facias* in selling the lands taken in execution under it, and when t sold, the return to the *renditioni* relates to, and, in becomes part of, the return to the *feri facias*. Suppose the sheriff had sold the lands under the *feri facias* with of a *renditioni exponas*, and had returned that he had so

449 in the schedule mentioned, * which lands wer within certain metes and bounds set out in the r sale, can there be a doubt that the return thus correctl the lands would not be sufficient, to give certainty to th in the schedule? If then the description in the schedr corrected by the return to the sale, if made immediatel *feri facias*, it cannot be perceived why it should not be

that purpose, when made to a *venditioni exponas*, whose only office is auxiliary to the *fieri facias* and to carry it into effect. The purchaser claims title under the united effect, of both those writs, and if certainty is the object to be attained, he has a right to resort to the whole judicial proceedings, under which his title accrued to ascertain it.

It has been contended that the description of the lands in the return to the *venditioni exponas* is not sufficiently certain, to ascertain the location of them. That they might have been described with more accuracy cannot be doubted, but we think there is sufficient certainty, to enable the party to make a true location of them.

The second objection to the proceedings of the Court, that these lands were taken in execution prior to the Act of 1825, ch. 103, cannot avail the appellant. The right of the party to obtain a writ of *habere facias possessionem* under that Act, does not relate to the time the execution was issued, but to the time when the lands were sold, and it appears from the record, the lands in this case were sold on the 17th day of June, 1826, long after the passage of the Act.

Judgment affirmed.

* STATE, use of OYSTER *vs.* ANNAN.—December, 1829. 450

The bond of a trustee appointed by the Chancellor to sell the real estate of a deceased person, for the payment of his debts, is not liable to be put in suit, after the trustee had sold the deceased's property, and received the money therefor, upon the order of the Chancellor distributing such proceeds among the creditors, without notice to the trustee of such distribution. (a)

(a) Affirmed in *Brooks vs. Brooke*, 12 G. & J. 317; *Scott vs. State*, 2 Md. 290; *State vs. Digges*, 21 Md. 243; *Dent vs. Maddox*, 4 Md. 529; *State vs. Mayugh*, 13 Md. 377; *Gott vs. State*, 44 Md. 339. Cited in *Norris vs. Lantz*, 18 Md. 268; *Thruston vs. Blackiston*, 36 Md. 508; *Gorsuch vs. Briscoe*, 56 Md. 576; *Ex parte Colvin*, 3 Md. Ch. 303.

Where property is sold under a decree of a Court of equity, the proceeds of sale are considered in the custody of the Court, and no person, whether a party to the suit or not, can maintain a suit at law for the recovery of any portion thereof, until payment of the claim thus prosecuted shall have been awarded by the Court, and notice of such award, and a demand of payment, shall have been made of the trustee, or other officer, in whose hands the fund may remain as the fiduciary agent of the Court. *Brooks vs. Brooke*. The mode of proceeding in such a case is set out at length and with great precision in the case in the text, which has long controlled the Maryland practice in this particular. *Scott vs. State*. There is no breach of the contract nor is the trustee in default, until his refusal or failure to comply with the order of the Court after notice thereof. *State vs. Digges*. The same reasons would apply to an action of assumpsit against the trustee for money had and received. *Dent vs. Maddox*. Since a creditor of the party whose property has been sold by a decree of a Court of equity cannot maintain an

APPEAL from Frederick County Court. This debt on a trustee's bond, under a decree of the Court brought by the appellant on the 18th of February, 1808, for special performance. The following statement agreed upon by the parties: "It is admitted the deed made and executed the writing obligatory mentioned in the following words, to wit." Know all men, that we, Robert L. Annan, William Long, Jacob Philip Nunnemaker, all of Frederick County and State of Maryland, are held and firmly bound unto the said State of Maryland full and just sum of four thousand pounds current money to the said State, to the payment whereof we bind ourselves, heirs, executors and administrators, jointly and several, these presents, sealed with our seals and dated the 28th of February, 1808. Whereas by a decree, of the high Court of Chancery, passed at December Term, 1807, the above named, Robert L. Annan and William Long, were appointed trustees to sell the real estate of Solomon Kephart, late of Frederick County, deceased, for the payment of his debts, as by the said decree, reference being thereunto made, will appear; now the condition of the above obligation is, that if the said Robert L. Annan and William Long, do and lawfully perform the trust reposed in them by the said decree, or to be reposed in them by any future order or decree of the said Court; then the obligation to be void, &c.

"That before the making the said writing obligatory, on the 28th day of December, in the year of our Lord, one thousand eight hundred and seven, it was by the honorable the Court of the State of Maryland on the petition of the said Solomon Kephart, deceased, upon a bill filed by him against them against his heirs-at-law, adjudged, ordered and decreed, that the said Robert L. Annan and William Long, should be appointed trustees to sell the real estate of the said Solomon Kephart, deceased, for the payment of his debts, as by the said decree, reference being thereunto made, will appear."

451 action on a trustee's bond before his claim is audited and ordered by the Court having control of the trustee, so neither can a creditor insolvent maintain an action against the trustee of the insolvent for an order of distribution and notice to the trustee. *State vs. May*, 56 Md. 573.

In *Brent vs. Maryland*, 18 Wallace, 488, the Court recognized the correctness of the decision in the case in the text, but thought that it conflicted with other authorities to the effect that where the trustee is a creditor in the transaction, and has full knowledge of his duties, no notice and demand are not required. And it was held, that where, in a case where the trustee presents the petition for the payment of his debts, and to make the same, and himself becomes bound in bonds for the performance of the duties belonging to such office, and himself makes all the orders and procures all the orders under which the trustee's liability arises, he may, if he is liable for the non-payment of money ordered by the Court to pay, be sued without formal notice to him.

the real estate of the said Solomon Kephart, should be sold to pay his debts. And in the said decree, Robert L. Annan the defendant in this cause, and a certain William Long, were appointed trustees for the purpose of selling the real estate of the said Solomon Kephart, deceased, to raise money to pay his debts, that the said Robert L. Annan and William Long, accepted the said trust, and executed and made the writing obligatory aforesaid for their trust bond, which was filed in the Chancery Court and approved by the Chancellor, that in the said decree the said Robert L. Annan and William Long, were directed to proceed to sell the real estate of the said Solomon Kephart, deceased, and were also directed to bring the money arising from the said sale or sales, under the said decree, into the Chancery Court, to be applied under the directions of the Chancellor, or pay it away under the direction of the said Chancellor, after taking out the commission to be allowed the trustees, and the costs of the suit; that the said defendant and the said William Long, on the 7th day of March, 1808, made sale of part of the said real estate of the said Solomon Kephart, deceased, amounting to \$1,437, and made a report thereof to the Chancellor. That upon the petition of the creditors of the said Solomon Kephart, being again presented to the Chancellor, he did by another order and decree, direct the said Robert L. Annan and the said William Long, to make a further report of their proceedings, and of the situation of the said real estate of the said Solomon Kephart; that the said Robert L. Annan and William Long, in obedience to the last mentioned order and decree of the Chancery Court, did on the 8th day of April, 1815, after the copy of the said order and petition was served on them, sell the balance of the real estate of the said Solomon Kephart, and made report thereof to the Chancery Court, amounting to the sum of \$952. That the said Robert L. Annan and William Long, received the whole purchase money from the purchasers, both at the first and second sale, but never brought any part of * it into the Chancery Court, and never paid any of it away under the direction of the Chancellor. That the Chancellor did regularly order and direct the auditor of the Chancery Court, to state and report an account between the estate of the said Solomon Kephart and the said Robert L. Annan, and the said William Long; that the auditor of the said Court in obedience to the said order of the Chancellor, did state an account as aforesaid, and did report the same to the Chancellor, in which account, after taking out the commission to the trustees, and their part of all expenses in both sales, and the costs of the Chancery Court, he did distribute the balance to the creditors according to their respective claims, which account, distribution and statement, was afterwards confirmed, and the proceeds of the sales of the said real estate applied according to the statement and distribution made by the said auditor, as appears by Exhibit C, made a part of this statement and contained in the following words, viz.”

Here follows the auditor's report, showing the claim of Jacob Oyster, marked No. 3, to amount to \$346.36, his proportion as distributed by the auditor, amounting to \$48.88, and the Chancellor's order thereon, confirming the same and directing the proceeds to be applied accordingly, dated January 18th, 1820.

"That the said auditor in distributing the proceeds of the sales of the real estate of the said Solomon Kephart, deceased, has given to the plaintiff in this cause as one of the creditors of the said Solomon Kephart, as his dividend the sum of \$48.88, as appears in the paper marked C, and the Chancellor by his said order has directed the defendant Robert L. Annan, and also the said William Long, trustees as aforesaid, to pay to the plaintiff in this action the said sum of \$48.88, as aforesaid, with interest in proportion as it has been or may be received. That after all the proceedings aforesaid, the plaintiff in this action brought suit in the name of the State of Maryland for his use against the said Robert L. Annan, the defendant, on the said bond given by him as one of the said trustees for the faithful performance of his trust, to recover his distributive share of the proceeds of the sale of the real estate of the said Solomon Kephart, with interest thereon as aforesaid. It is admitted that *no
453 part of the money due to the plaintiff as aforesaid, has been paid by the defendant or any other person. It is admitted that the Chancellor of Maryland, at the time he passed said order on exhibit C, had full and competent authority to pass said order, and the same was legally passed by him. If upon this statement of facts the Court shall be of the opinion that the plaintiff is entitled to recover, judgment is to be entered up for the plaintiff for the penalty of the bond to be released on the payment of the sum of \$48.88, with interest in proportion as it has been or may be received, and costs of this suit. If the Court shall be of opinion that the plaintiff is not entitled to recover, the judgment of *non pros* is to be entered. Both plaintiff and defendant reserves the right of taking an appeal to the Court of Appeals upon the judgment of the Court."

On the above statement, the County Court gave judgment for the defendant, and the plaintiff appealed to this Court.

The case was submitted on notes.

Boyle and Pigman, for the appellant. The only point in the cause, is whether the plaintiff was bound to give notice to the defendant, of the Chancellor's order to pay the money, and demand it, before he can maintain his action on the trustee's bond?

The case stands upon a statement of facts agreed to by the plaintiff and defendant. This case will settle a very important principle, and rule of practice, as to the right of suing on administration bonds.

The bond will be found in the record, and the Court's attention is called to the condition. It is the usual condition for the performance

of duties imposed by the original decree, or that may be put upon the trustees by any future order by the Chancellor. The condition does not provide that notice shall be first given of the decree, or order, before action shall be maintained. It was therefore no part of the undertaking or contract, that notice should be given to enable a distributee to maintain his action. The Chancellor's order does not require notice to be given at all—what then makes notice necessary to enable the plaintiff to maintain his suit? There is no law requiring *it; you must amplify the law, the contract, and the order of the Chancellor, before you can require any further notice of the cause of action, than was given by the writ of *capias* which originally issued in the case. The rule as to notice to be given by one party to another before action, is this: where the thing is more in the knowledge of the plaintiff than defendant, plaintiff is bound to give notice, but where each party have the same knowledge, notice is not necessary; for the cases on this point, the Court is referred to 1 *Chitty Pleadings*, 320. Now the dispute in this cause is between trustees, officers appointed by the Chancellor, and one of the distributees. The Chancellor orders the auditor to state an account current between the trustees, and the estate of Solomon Kephart. This the auditor does, and after taking out costs, &c. distributes the money among the creditors, and reports to the Chancellor who confirms his report. The plaintiff sees the sum of \$48.88, distributed to him, as one of the creditors, he knows by enquiring, and the defendant might have known the same, by adopting the same means. It is true that it is usual, when the Chancellor intends to bring an individual into contempt for disobeying his order, to insert a provision to give notice by serving the order. But the order in this case was to enable the distributees to sue the bond if the money was not paid. Cases may be found in England where notice is necessary to bring the party into contempt for disobedience, as for not bringing money into Court, &c. But our form of trustee's bond is peculiar, and the rights of the parties are defined in the condition, and the Act of Assembly under which it is given.

F. A. Schley, for appellee. The question is, were the trustees entitled to notice from or a demand by the creditors before they were liable to be sued? Or has the creditor the right, immediately on the ratification of the sale, to institute a suit on the trustees' bond without any notice or demand, or any opportunity afforded them to pay without being sued?

This question is *res integra* in Maryland. The Court, and that too of the last resort, are now, for the first time, called on to settle the law in this State as to the liability of trustees appointed by the Chancellor. It is an important question, as its decision will prescribe the duties and fix the liabilities of a numerous class of agents, which the interests of creditors and the convenience of our Courts make necessary.

456 *The sale of lands by trustees in the c sale in the Chancery office by a master great convenience and of great advantage to the Instead of being made in the Chancery office a New York, it is made on, or in the immediate ne property, where it is best known, and bidders mos. The Court should therefore be cautious to establish its oppressive operation would be likely to deter per ing trustees. 2 Stark. Ev. 977; 4 Johns. Ch. Rep. 6 the Court establish a rule under which a trustee coul and practicable diligence, and with fair and bona fide in cute his trust, protect himself from costs and losses ruinous?

If such a rule is established, who would assume th and ruinous responsibility of a trustee? In England, a Court of Chancery enforces its orders and decrees b &c. The party, however, must first be in contempt, be in contempt until he refuses to perform the order he cannot refuse until he is called on to perform. " always be done by serving a copy of the order or dec **457** give him the * opportunity to perform." Wy 298; Hinds' Prac. 494; 1 Harr. Ch. 443; 2 H

This rule is founded on common sense and common ju paid into Court cannot be withdrawn by the person e under an order for that purpose, which must be serv countant-general. Wyatt, 284; 2 Harr. Ch. Prac. 142.

If ready and willing to pay, he ought to have the o forded him. Sheer justice demands this, to say n equity. The party or creditor has two remedies: h proceed by way of attachment against the trustee alo sue on the bond and include the securities.

In either case, however, the trustee must be in defa have done that which would amount to a refusal to obe order, to a contempt of the Court. If a suit is broug be an averment in the pleadings that the trustee had Chancellor's order. See the pleadings in a similar cas son's Cases, 53, *The People vs. Bryan*.

In all cases of a similar kind found in the books, notie is averred, either in the declaration or replication. 5 376; 10 Johns. Rep. 285; 3 Chitty Plea. 178, 179; 1 Tan

There are eighty-two claims. Each claimant may bri the bond being several. This would make the aggreg hundred and twenty-eight suits, which at five dolla **459** cents to each, would produce an aggregate of one thousand six hundred and ninety-eight dol cents! And this too is the lowest amount of costs th escape with if they were to go to each creditor and pay

the writs were served. The Court will see that the claim of Jacob Eversall is only \$16.10; John Sawyer, \$19.12, for which suits were brought, and if the trustees are compelled to pay the costs of these suits, they will amount to more than the principal, that is, the costs in each case will amount to \$22.60.

There is one of the claimants named John Kennedy. This claim amounts to nineteen cents, now, can it be possible that the trustees could be compelled to ride over the State to find Mr. Kennedy to pay him these nineteen cents, or be liable to be sued with four writs, and made to pay \$22.60 costs. Impossible!

The whole net amount of sales is only \$2,075. Yet, if all the claimants had sued, as soon as the audit was ratified, the trustees might have been compelled, according to the plaintiff's idea, to pay nearly the whole of this sum in costs. If the trustees are not entitled to notice, to the service of a copy of the audit, or the Chancellor's order, they cannot protect themselves from these ruinous consequences; no, not even though they take their seats at the Chancellor's elbow, and wait there for years to know when the order will be passed; for if they go to pay a creditor in Baltimore, Finley and Taylor, for instance, they may be sued while they are in the act of paying there by the present very vigilant plaintiffs in Frederick. No willingness, no diligence, no readiness to pay can save them; it is morally impossible for them to protect themselves from ruinous costs, if the creditors are so disposed, and yet I have always understood it to be a maxim of the law of common sense and common justice that *lex neminem cogit ad impossibilia*. If it be said that trustees may relieve themselves from these difficulties, these ruinous consequences, by paying the money into Court, the answer is, that this would produce such great inconvenience to creditors, that all the benefit arising to creditors and others, from trustees residing near them and near the property sold, would be lost. The creditors, though residing in Allegany or Worcester, would have, each one, to go to Annapolis to the Chancellor for a check or order for the amount of his claim, however small. I cannot believe the Court will establish a rule producing such serious inconveniences to suitors and claimants, when a rule obviating every inconvenience to all parties, and based upon reason, equity and sheer justice, is equally in their power. Surely a creditor ought to be satisfied, and can have no right to complain if he is paid his money when he asks for it. Surely a trustee ought to be protected, both by Courts of law and Courts of equity—for they are both Courts of justice—when he has acted *bona fide*, when he is ready, willing and anxious to discharge his trust; when he says, present me the order that I may know what it is, and to whom I am to pay, and I am ready to perform—the money is in my pocket, and has been there for some time waiting for this order.

462 EARLE, J. delivered the opinion of the Court. This suit was brought by a creditor on the bond of a trustee appointed by the Chancellor, to sell the real estate of a deceased person for the payment of his debts. The statement agreed on between the parties gives a full account of the proceedings of the trustee in Chancery, from the acceptance of his trust, to the confirmed report of his sale, and the Chancellor's order of distribution of proceeds among the creditors. The action was instituted within a month after the order, and the complaint is that the plaintiff's proportion of the avails of the sale was sought without giving to the defendant, any previous notice of the final proceedings of the Chancellor.

We have given to this case a further consideration, and after an examination of the authorities, we are inclined to think our first impressions of it were not correct. The trustee as to the suit is not in the situation of a common debtor, who knows his liability, and whose business is to look to a compliance with his engagement; nor is his predicament like that of an executor or administrator, who represents the deceased testator, or intestate, in all and each of his contracts, and to whom the creditors individually, are to exhibit their claims for settlement. The creditors are known to the trustee but through the medium of the Court of Chancery, where they file their respective demands to be adjusted by the auditor, and where disputes among them are disposed of by the Chancellor, who finally determines what proportion of the sum of money reported, is to be paid to each of them. This proceeding as to the trustee, is *res inter alios acta*, and it is but reasonable that when it terminates he shall be notified of the result, before any steps are taken against him, either by attachment, or by action on his trustee's bond, against

463 * him and his sureties. In the case of an order for distribution and payment, similar to this, to sustain the plaintiff's suit, it appears to us therefore, that he ought to aver and prove a service of the order on the trustee, and a demand of payment of the sum specified therein; and that without this notice so averred in the proceedings, an action on the trustee's bond cannot be maintained.

Vid. 3 Johns. Cases, 53.

The Court mean to confine this decision to an order for distribution and payment by the Chancellor, and with this understanding the judgment of the Court below is affirmed.

Judgment affirmed.

CRANE *vs.* MEGINNIS.—Court of Appeals, Eastern Shore, June Term, 1829.

The Constitution of this State composed of the Declaration of Rights, and form of Government, is the immediate work of the people in their sove-

reign capacity, and contains standing evidences of their permanent will. It portions out supreme power, and assigns it to different departments, prescribing to each the authority it may exercise, and specifying that, from the exercise of which it must abstain. (a)

The public functionaries move in a subordinate character, and must conform to the fundamental laws or prescripts of the creating power. When they transcend defined limits their acts are unauthorized, and being without warrant, are necessarily to be viewed as nullities.

The legislative department is nearest to the source of power, and is manifestly the predominant branch of the government. Its authority is extensive and complex, and being less susceptible on that account of limitation, is more liable to be exceeded in practice.

Its acts out of the limit of authority assuming the garb of law, will be pronounced nullities by the Courts of justice; it being their province to decide upon the law arising in questions judicially before them, and upon the Constitution as the paramount law. (b)

The check to legislative encroachments is to be found in the Declaration, that the legislative, executive and judicial powers, ought to be kept separate and distinct; and the solemn obligations of fidelity to the Constitution under which all legislative functions are performed. (c)

(a) Cited by COCHRAN, J. in *Anderson vs. Baker*, 23 Md. 588, where it is said that the Declaration of Rights "is to be taken as a part of the Constitution. It declares not only doctrines relating to and confirmatory of personal rights, but principles to be regarded in administering the government; like the Constitution, it was the work of the people acting in their sovereign capacity, and, with the Constitution was intended to prescribe the form and power of the government. Each has its office: one is general, the other is particular; and taken together, resort may be had to either, to ascertain the meaning and effect of the other. That the Declaration of Rights furnishes a guide for the construction of ambiguous provisions of the Constitution, as well as a test of the validity of laws not specifically required by the Constitution, and otherwise free from objection, is conceded; but if the Constitution differs in any of its provisions from the general doctrines or principles set forth in the Declaration of Rights, such provisions are to be regarded as limitations or qualifications of those general doctrines or principles, and allowed to have effect accordingly."

(b) Approved in *Regents vs. Williams*, 9 G. & J. 410, and *Wilson vs. Hardesty*, 1 Md. Ch. 67.

(c) Cited in *Müller vs. State*, 8 Gill. 150; *Baltimore vs. State*, 15 Md. 459; *Baltimore vs. Horn*, 26 Md. 207; *Davis vs. Helbig*, 27 Md. 468; *Dorsey vs. Dorsey*, 37 Md. 77, 78. As to the origin of the constitutional theory of the distribution of the powers of government, see 6 *Southern Law Review*, 860, 861. In considering the question as to the separation of the departments, we are to bear in mind that the Declaration of Rights is not to be construed by itself according to its literal meaning,—it and the Constitution compose our form of government, and they must be interpreted as one instrument. The former announces principles on which the government, about to be established, will be based. If they differ, the Constitution must be taken as a limitation or qualification of the general principle previously declared, according to the subject and the language employed. *Baltimore vs. State*. In the other cases above cited, Acts of Assembly exercising judicial powers were held to be unconstitutional.

Divorces in this State from the earliest times have emanated from the General Assembly, and can now be viewed in no other light, than as the exertions of legislative power. (d)

The suit for alimony in this State is a distinct remedy from that for a divorce, and for a series of years the wife's maintenance has been recoverable through the intervention of our judicial authority. (e)

464 * A divorced wife may recover, (having merits) a maintenance adequate to her station in life, and to quadrate with the husband, by a bill in Chancery. (e)

The 8d section of the Act of 1823, ch. 95, by which the Legislature directed a husband to pay a trustee for the use and benefit of a wife whom such Act divorced him, a sum certain annually, is repugnant to the judicial authority, repugnant to the Constitution of Maryland.

APPEAL from Kent County Court. This was an act of appeal, brought by the appellant as trustee of Mary Meginnis, for the sum of \$150, being the first semi-annual instalment directed by an Act of the General Assembly of Maryland, that the said appellant by the appellee, for the use of the said Mary Meginnis.

The declaration stated, "that whereas heretofore, by an Act of the General Assembly of Maryland, begun and passed at the City of Annapolis, on the first Monday of the month of March, in the year 1823, by a certain Act of the said General Assembly, entitled 'an Act for the relief of Mary Meginnis, and for other things enacted, that the said Casparus Meginnis, by the passage of the said Act, be and he was then and he is now deprived, of all and every interest, authority, power, and to the person of Mary Meginnis, his wife, who had never been married; and that the said Mary Meginnis was therefore declared capable to have, hold, take, and recover, by compromise, suit or suits, in law or in equity, of any kind whatever, real, personal, or mixed, in any manner, as if she was a *feme sole*, and to use and dispose of the same, at her will and pleasure, and might sue and be sued as if she was a *feme sole*; and that the said Casparus Meginnis should annually thereafter pay to the said John Wright, trustee, thereby made trustee in that behalf, to and for the use of the said Mary, the sum of \$300, in two equal instalments, the first day of March, and the second on the first day of September."

(d) Approved in *Wright vs. Wright*, 3 Md. 448, et seq. 22 Md. 498. The exercise of the power of the General Assembly may have grown out of the circumstances of the Ecclesiastical Courts in Maryland, or may have been introduced from the action of the British Parliament, which from the middle of the eighteenth century exercised the power of the General Assembly, for causes supervenient to the marriage. *Wright vs. Wright*, 3 Md. 448. Const. Md. Art. 3, sec. 88.

(e) Cited *Dunnock vs. Dunnock*, 3 Md. Ch. 148; 1 Md. 298.

in each and every year, during the joint lives of the said Casparus, and Mary, and the said trustee should be authorized to institute * suit in his own name for any instalment, which should not be paid on the day on which the same was thereby 465 declared to be due, and it should be the duty of the Court before whom the suit was brought to try the same at the term to which the writ was made returnable; and that the said Casparus Meginnis, should not be liable for any debts to be hereafter contracted by the said Mary; and that the annuity thereby directed to be paid should cease on the death of the said Casparus or Mary, whichever of them should first die; and that nothing therein contained should in any manner prevent the said Mary, if she should survive the said Casparus, from claiming the part or share of his estate, real, personal or mixed, which she would be entitled to, if the said Act had not passed: And that if the said John should die or refuse or neglect to act as trustee, it should, and might be lawful for the Orphans' Court of Kent County, on the application of the said Mary, to appoint a trustee for her benefit, who should thereafter be invested with all the authority thereby given to the said John, as by the record of the said Act of Assembly remaining of record in the office of the Clerk of the Court of Appeals for the Western Shore, may more fully and at large appear; and the said John in fact saith, that after making of the said Act of Assembly, the said John took upon himself the execution of the said trusteeship, and that the said Casparus and Mary both continued in full life from and after the passage of the said Act of Assembly, until the first day of March in the year 1824, and still are in full life, to wit: at Kent County aforesaid, by reason whereof, &c. To this declaration the defendant demurred generally, and the plaintiff joined in demurrer. A *pro forma* judgment was rendered by the County Court on the demurrer for the defendant, and the plaintiff appealed to the Court of Appeals.

The cause was argued at June Term, 1828, before EARLE, MARTIN, STEPHEN, ARCHER, and DORSEY, JJ.

Chambers, for the appellant: The objection raised against the Act of 1823, ch. 95, in virtue of which the action was instituted, was understood to arise out of the 10th sect. of the 1st article of the Constitution of the * United States, which prohibits the passage by a State Legislature, of "any *ex post facto* law, or laws 466 impairing the obligation of contracts."

The Act of 1823, is certainly not an *ex post facto* law. Such a law has relation to acts of a party, not to rights of property: an enactment which makes that a crime which was not a crime, at the period of its commission. *Vide Celdon and Wife vs. Bull and Wife*, 3 Dal. 386. The exposition by Judge Chase and Judge Patterson as to this provision.

Nor does this Act impair the obligation of any contract meaning of the Constitution. Contracts relating to money were those only which it was intended to include expressions. Marriage contracts were never contemplated not heretofore been questioned, and is not now, that the can grant a divorce, even a divorce *a vinculo matrimonii* only impairs, but destroys the marriage contract. It is a matter of internal police, which the interests of society require be fit matter for legislation, and which the States never designed to transfer to the General Government or to such has been exercised at all times, and in most, if not all the then the right to grant divorces be vested in the Legislature necessarily an incident to its useful exercise, that there be power to express the terms of the divorce, to arrange property for the future subsistence and comfort of an The same solemnity, and the same obligation could be protection of the marital rights, which could be a protection of the rights of property. The reason is why one may be invaded by legislative interposition, be exempt. Accordingly, we find such to be the uniform the Legislature, who have by the same Act, assumed over the estates of individuals so far as to make proper their future pecuniary comfort. Practice and acquiescence construction, and Courts will not afterwards allow it 1 *Cranch*, 299; *Stewart vs. Laird*. A variety of laws period of our history, will be found in the statute books for many years, * the law of 1818, ch. 203, enacted 467 of the most distinguished legal characters and members of the Legislature, has been a sort of form

Should it be urged that this Act assumes power the legislative department of the government, which belongs to the judicial tribunals, and therefore opposed the Bill of Rights, which declares they shall be distinct; a great number of Acts may be referred to which give special power to the same extent has been exercised in the case of *Garretson vs. Cole*, 1 *H. & J.* 391, the case to a law empowering the Court of Appeals to review its decision.

Should a difficulty be made, because of the provisions provided in this Act, the Court will find it obviated by the case of *Columbia vs. Okely*, 4 *Wheaton*, 235.

Spencer and Bayly, for the appellee, referred to 434; 3 *Bla. Com.* 94; 1 *Fonb. Eq.* 90, note 104; 19 *Ves. Jr.* 397; *Galwith vs. Galwith*, 4 *H. & J.* 1777, ch. 12, sec. 4; *Watkins vs. Watkins*, 2 *All Rights*; 18 *Article Bill of Rights*; *Whittington vs. Whittington*, 242; *Vanhorne's Lessee vs. Dorrance*, 2 *Dall.* 30

252, 382; 21 *Article of the Constitution*; Act of 1676, ch. 21; 1678, ch. 18.

Carmichael, on the same side. * The rules and principles by which the decision of cases of alimony were regulated might **468** be found by reference to 1st *Chitty's Black.* 441; 3 *Ib.* 94; *Watkyns vs. Watkyns*, 2 *Atk.* 97; 1 *Fonb. Eq.* 94, note 104; *Duncan vs. Duncan*, 19 *Ves. Jr.* 396, 397.

From the researches of counsel it did not appear in what Court, under the colonial government, the claims for alimony were considered. That such causes were not heard and adjudicated by the Commissary General or his deputies might be inferred from the silence of *Valletto* in his *Deputy Commissary's Guide*.

Whether they were in the Court of Chancery was a question to which no evidence could be readily furnished. The only case that had been decided in the Province is to be found in *Galwith vs. Galwith*, 4 *H. & McH.* 477, in that case the County Court of Calvert had heard and given judgment upon a claim for alimony, which judgment was reversed by the Provincial Court.

By the Declaration of Independence in 1776, Maryland became a sovereign, independent State with general powers, the limitations to the exercise of which existed only in the Constitution and Bill of Rights. At this period it could not be denied that the claim for alimony was within the jurisdiction of the Legislature.

There was no other tribunal before which it could be presented. No such authority had then been imparted to the judicial tribunals, or to the executive of the State. But in the next year the cognizance of claims for alimony was given to the Court of Chancery. This will be found in the 14th sec. of the 12th ch. of the Act of 1777.

Among other evils that were felt under the colonial government were those which arose from the exercise by the English colonial governors of all the functions of government, executive, legislative and judicial. The Bill of Rights regarding the abuses necessarily incident to the concentration of these powers, declared that the legislative, judicial and executive powers shall be kept forever separate and distinct. In pursuance of this principle the Act of 1777 was passed. Whether a modern Legislature have the constitutional right to repeal this law and clothe themselves with power to hear and adjudicate cases of alimony is not the matter to be decided, but it is, whether this law being unrepealed, and in force, the Legislature of 1823 had the right to subtract this particular cause from the legal tribunals of the State, make the Courts of law a registry for their decisions, and impose upon them the task of giving efficacy to a law without the power of enquiring into its justice or legality.

* *Chambers*, in reply. The sixth article in the Bill of Rights, like the other declaratory articles in the same instrument, was **470** intended to assert a general principle. No government ever did, or ever can exist, in which a precise verbal and literal execution of that

article and others will be found. Those who framed, and those who enforced our admirable principles of government, so considered them. The 47th number of the *Federalist*, from the pen of Mr. Madison, shews this fully.

It would be an endless task to cite to the Court the numberless instances in which the principle, if taken in the latitude now claimed, has been impugned. In the very first session after the Bill of Rights was framed, and when no doubt the very men who adopted it were members of the Legislature, we find laws to revive proceedings in Court—to revive and aid proceedings in Court—to direct the record- ing of a deed. In the next year, 1778, laws were made to empower persons to sell land—to authorize a deed to be recorded—to enable a widow and executrix to sell her testator's land. In 1779, to revive and aid proceedings in Worcester Court—to revive and continue actions and process in Talbot Court—same in Caroline Court—to enlarge the powers of an executrix, and to record deeds, and to take depositions. These are Acts partaking of a judicial character, some in a greater degree, others less, but all more than the case at bar. In most of these cases there was a plain and ample existing remedy through the judicial tribunals; here there was no power but the Legislature who could administer remedy for the principal evil, and in this exercise of exclusive power over the principal subject, they have legislated also for the accessory. The same system of legislation has been continued from our primeval history to this period, and the evidences of the want of constitutional obligation in these laws. This case of *Stewart vs. Laird* would seem to make them a contrary evidence of themselves, being a cotemporaneous construction. The sole object of these declaratory principles is to prevent the usurpation by one branch of the government of such power and jurisdiction belonging to another branch as would consolidate the one and annihilate the other, * at least to an extent which would encourage the use of arbitrary power.

If this was a case of alimony, distinctly and exclusively, there would be reason for the objection urged. It is conceded, that the subject of alimony, is one of judicial cognizance, according to the laws of Maryland. But alimony is not recoverable in a case of separation without divorce.

The twenty-first article in the Bill of Rights is subject to the same limitation, as before applied to the sixth. Such a case as the present, is not in its contemplation. Private property is taken for public service in seasons of war, for roads, canals, and other great exigencies, and taken against the will of its owner, and without any supposed violation of this article in the Bill of Rights. So private property, and private rights, must yield to the more imperative claims of public interest, and the proper police of the State. The marital rights acquired by the contract, are as solemnly secured, and as dis-

tinently defined, and as important in their character, as the rights of real or personal property, and yet these are affected and destroyed, when their longer possession by the individual, conflicts with the great principles which regard the morals and well-being of society; and when affected, they require of necessity the incidental operation of the law upon the pecuniary rights of the parties. But in this case it is contended, the law of the land and the judgment of peers, are the instruments by which the party's property is to be taken away. The Act of Assembly is the law of the land, and the trial by a jury is secured to him.

There is no evidence in this case, that the Act passed without the consent of the husband, and to reject any presumption necessary to sustain the Act of the Legislature, would be in disobedience to the courtesy and respect, which are due from one branch of the government to the other, according to the principle of both political and municipal law.

If this power does not reside in the Legislature, it exists nowhere. The laws of Maryland have not conferred on any judicial tribunal, the power to divorce or separate husband and wife. The Legislature alone, is competent to exercise jurisdiction on * the subject, and being in possession of jurisdiction of the principal matter, **472** can rightfully do whatever the peculiar circumstances of a case may demand, and it is a most delicate office in an inferior or co-ordinate department of the government, to assume, that it has acted unadvisedly and without competent information of the facts, or to pronounce its enactment, in violation of the Constitution or Bill of Rights.

EARLE, J. at this term delivered the opinion of the Court. A constitutional question is involved in the consideration of this case, and before we enter upon the solution of it, we will state some positions preliminary to the subject.

The Constitution of this State, composed of the Declaration of Rights and form of government, is the immediate work of the people, in their sovereign capacity, and contains standing evidences of their permanent will. It portions out supreme power, and assigns it to different departments, prescribing to each the authority it may exercise, and specifying that from the exercise of which it must abstain. The public functionaries move then in a subordinate character, and must conform to the fundamental laws or prescripts of the creating power. When they transcend defined limits, their acts are unauthorized, and being without warrant, are necessarily to be viewed as nullities. If considered as valid acts, the distinction between unlimited and circumscribed authority is done away, the derivative exerts original power, and of constitutional law nothing is left but the name.

The legislative department is nearest to the source of power, and is manifestly the predominant branch of the government. Its

authority is extensive and complex, ^{and being less susceptible} that account of limitation, is more ^{liable to be exceeded in practice} Its acts, out of the limit of authority, ^{assuming the garb of law,} be pronounced nullities by the Courts of justice; it being their province to decide upon the law arising in questions judicially before them, and upon the Constitution as the paramount law; but this more in fulfilment of their own duty, than to restrain the excess of a co-ordinate department of the government. The check to legislative encroachments is to be found in the declaration, that

473 the legislative, executive, and judicial powers ought to be kept separate and distinct; and in the solemn obligations of fidelity to the Constitution, under which all legislative functions are performed.

With these general views of constitutional law, we proceed to consider the questions more immediately before the Court. On the argument of the cause, the Court's attention was directed to Act of Assembly passed in 1823, entitled, "An Act for the relief of Mary Meginnis" which the appellee's counsel asserted to be in violation, in some of its provisions, of the Constitution of the State. Should it be found to be so, the judgment of Kent County Court will be affirmed, appeal having been taken in a suit founded wholly upon this Act of Assembly. Whether the Act is then an infringement of the Constitution, is the main question to be determined by this Court, and rests upon the two following points: Is the enactment of the third section of the Act of 1823, an exercise by the Legislature of judicial power? Is the exercise by the Legislature of judicial power, in the passage of a law, repugnant to the Constitution?

The Act of 1823 is an Act of divorce, separating Mary Meginnis from the bed and board of her husband, and its third section is clothed in this language: "And be it enacted, that the said Casparus Meginnis shall annually hereafter pay to John Crane of Queen Anne's County, who is hereby made the trustee in that behalf, to and for the use and benefit of the said Mary Meginnis, the sum of three hundred dollars, in two equal instalments, the first on the first day of March, and the second on the first day of September, in and every year during the joint lives of the said Casparus Meginnis and Mary Meginnis, and the said trustee shall be authorized to institute suit in his own name for any instalment which shall not be paid on the day on which the same is hereby declared to be due, and it shall be the duty of the Court before whom the suit is brought to try the same at the term to which the writ is made returnable. This grant of an annuity, is called a grant of alimony, and it is intended, that after the legislative separation, it might have

474 recovered by the wife in the Court of Chancery, pursuant to the laws of this State, if her case merited the interference of the Chancellor, and the circumstances of the husband justified the allowance of such a sum.

The investigation of this point led us into a general review of the British law of divorce and alimony. From the research it has appeared to us, that they are both of judicial cognizance in the Ecclesiastical Courts of that country; that the divorce *a mensa et thoro* separates the parties for unfitness for the marriage state, and the separation is the remedy administered for the injury to the suffering party; that alimony is the maintenance afforded to the separated wife for the injury done her by her husband, in neglecting or refusing to make her an allowance suitable to their station in life, and is treated as a consequence drawn from the divorce *a mensa et thoro*; and that each of those matrimonial causes is dependent on different facts, and is redressed by different judgments, although both are within the jurisdiction of the same tribunal. In this State the act of divorcing man and wife has been performed by the Legislature, for the want perhaps of ecclesiastical authority to effect it, or borrowing perchance the power from the Parliament of Great Britain, which sometimes granted divorces *a vinculo matrimonii*, for supervenient causes, arising *ex post facto*, a thing that the spiritual Courts could not do. However this may be, divorces in this State from the earliest times have emanated from the General Assembly, and can now be viewed in no other light, than as regular exertions of legislative power. The private Acts passed for more than ten years back we have adverted to, and almost every divorce law has been found to be expressed in terms peculiar to itself. In some, the mere separation from bed and board is effected in the plainest and shortest way, as in the case of Francis B. Mitchell by the Act of 1822, ch. 138, and in the case of Sarah Kerr by the Act of 1824, ch. 118; and in other Acts, separating the married parties, particular consequences of a continuing coverture are sedulously guarded against. In none, not even in the Act of 1818, ch. 203, referred to by counsel, is there any thing like a provision for the future maintenance of the wife, graduated to the circumstances of the * husband, and the station in life of the parties, as the Act of 1823 would appear to be. **475** On the other hand, the suit for alimony in this State, as in Great Britain, is a distinct remedy from the proceedings to obtain a divorce, and for a series of years the wife's maintenance has been recoverable through the intervention of our judicial tribunals. So early as the year 1689, in the case of *Galwith vs. Galwith*, 4 H. & McH. 477, it was asserted in the Supreme Court of the Province, that alimony is only recoverable in Chancery, or the Court of the Ordinary; and in the year 1777, the Act of Assembly was passed, which expressly authorized the Chancellor to hear and determine all causes for alimony, in as full and ample manner as such causes could be heard and determined by the laws of England in the Ecclesiastical Courts there. Since this last period, such causes have been continually acted upon by the Chancellor, and in some instances appeals have been taken to the Appellate Courts, and decided on by them. And

we cannot permit ourselves for a *moment* to doubt, that if Mrs. Meginnis, like Francis B. Mitchell *and* Sarah Kerr, had obtained simply an Act of divorce, she might *have recovered*, having merited a maintenance suitable to her station *in life*, and to quadrate with the situation of her husband, by a *bill in Chancery*, or an application to the equity side of Kent County Court. If she could have been thus redressed by an exercise of judicial authority, we would ask, is it not fair to conclude that the redress granted to her by the Legislature, is an exercise of judicial authority? The nature of the power employed must be judged of, by having an eye to the power exercised by a co-ordinate department. Should the executive try and sentence a felon to punishment, the judicial authority exercised could not be mistaken: and should the judiciary undertake to enact and promulgate a law, and exact obedience to it, the act would doubtlessly be pronounced, at once, an usurpation upon the functions of the Legislature.

The enactment of the third section of the Act of 1823, being in our opinion an exercise by the Legislature of judicial power, attention will now be engaged for a short time with the enquiry **476** * whether the exercise by the Legislature of judicial power in the passage of a law, is repugnant to the Constitution.

The decision of this point must depend upon the sound construction of the sixth section of the Bill of Rights, which says, "that legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other." This political maxim made its appearance, in some form, in all the State Constitutions formed about the time of the war of the Revolution, and is said to have been borrowed by them of the celebrated *Montesquieu's Spirit of Laws*, vol. 1, p. 181. In whatever terms they have adopted it, none of these Constitutions are the several departments kept wholly separate and unmixed. In some of them, as in the Constitution of this State, the executive is appointed by the Legislature, and the judiciary by the executive, and in others, the powers of the several departments are still more blended and mingled together. Upon a consideration of each of them, it seems to us to have been the intention to ingraft this invaluable maxim of political science on their respective systems, only as far as comported with free government, to prohibit the exercise by one department of the powers of another department or to confine each department to the exclusive exercise of its own powers. This last is admirably expressed in the Constitution of Massachusetts, and evinces a perfect acquaintance of its framers with the pages and doctrines of Baron Montesquieu. It is worded thus: "That the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them." The inhibition goes to the practical exercise

powers conferred by the Constitution, and to be used after it is in operation, and does not apply singly to the original distribution of powers among the departments of the government. In the same sense, we construe the sixth article of our Bill of Rights, which has the same objects in view with the Constitution of Massachusetts, although somewhat different terms are employed to express them. The one imitates the language, and the other dives into and expresses * the meaning of the venerated author from which they both copied. Their common purpose is to confine in **477** practice, the action of each department to its own appropriate sphere, by forbidding to it the use of powers allotted to the co-ordinate departments.

We have already determined the first point, and we have now to add our perfect conviction, that the exercise by the Legislature of judicial power in the passage of a law, is repugnant to the Constitution. Our conclusion from all this reasoning is, that the third section of the Act of 1823 is a nullity, and was rightly considered unavailable to support the plaintiff's action in the County Court where the suit originated, and that the judgment therefore ought to be affirmed.

In acting upon this case, we wish to be understood to decide nothing but the points before mentioned—only to adjudge that the exercise by the Legislature of judicial power, is in opposition to the Constitution, and that the enactment of the third section of the Act of 1823, was an exertion of judicial power, and is necessarily a void Act.

Judgment affirmed.

CHAPPELLEAR'S Ex'rs *vs.* HARRISON.—December, 1829.

In replevin the defendants avowed for rent in arrear due to them as executors of C. from the plaintiff as tenant to their testator, for the term of two years ending on the 31st December, 1820; and averred that the plaintiff still remained in possession of the rented premises. The plaintiff pleaded 1st, that he did not possess and enjoy the premises under a demise from C. as his tenant, in manner, &c. 2d. That C. did not demise the premises to him in manner, &c. 3d. No rent in arrear. Upon these pleas issues were joined, and on their trial in addition to proof of the avowry, it appeared that C. died in March, 1820—that on the 1st January, 1821, the avowants rented the same premises to the plaintiff for the year 1821, and as executors of C. made their distress for the rent of 1819–20—nineteen months after the termination of C's lease, and while the plaintiff was in possession under the demise of the avowants. The County Court instructed the jury, that the distress not having been made within six months next after the termination * of the demise by C. and the avowants having before the time of making their distress, **478** made a new lease to the plaintiff, they must find a verdict for him. It was held upon appeal, that no question as to the right of the avowants as executors of C. to make a distress for rent falling due under a demise by him, either before or after his death arose upon this record; that

and that the appellants as executors of John Chappellear, made their distress for the rent due and in arrear from the appellee for the years 1819 and 1820, under the demise by John Chappellear, on the 1st of August, 1822, nineteen months after the termination of the lease by Chappellear to the appellee, and when the appellee was in possession of the premises under and in virtue of a letting by the appellants. Upon this evidence, the Court before which the cause was tried, was of opinion and so instructed the jury (as we understand the opinion and instruction set out in the bill of exception) that the distress not having been made, within six months next after the termination of the demise by John Chappellear, and the appellants having before the time of making the distress, made a new lease of the premises to the appellee, they must find a verdict for the appellee, in which opinion and instruction we do not concur. No question as to the right of the appellants as executors of John Chappellear to make a distress for rent falling due under a demise by him, either before or after his death, arises upon this record. It does * not appear whether Chappellear himself had more than a **480** term in the premises; and whether the distress was made in due time or not, is a question that is not raised by the pleadings in the cause. If the appellee was desirous of making that question, he might, and ought to have raised it, by putting in a proper plea for that purpose. He might have pleaded that the distress was made after the expiration of six months, next after the termination of the demise by Chappellear, and thus have put that matter in issue. He did not so plead, and there was no issue joined, to which evidence of that fact was applicable, or to entitle the appellee to a verdict on that ground. The only questions presented to the jury by the issues appearing in the record, were 1st. Whether the appellee did possess and enjoy the premises, in which, &c. under a demise from John Chappellear as his tenant. 2d. Whether John Chappellear did demise the premises, &c. to the appellee. And 3d. Whether the sum of \$500 or any part thereof was due and unpaid as rent in arrear to John Chappellear—And the proof as stated in the bill of exception, appearing to be full in support of the issue joined on the part of the appellants, we perceive nothing to authorize the direction given to the jury to find a verdict for the appellee upon the issues joined in the cause, and which alone they were sworn to try.

Judgment reversed, and procedendo awarded.

THE MAYOR AND CITY COUNCIL OF BALTIMORE *vs.* HUGHES'
Adm'r *d. b. n.*—December, 1829.

Under the 2d sec. of the Act of 1797, ch. 54. the power given to the Mayor and City Council of Baltimore, "to tax any particular part or district of the city, for paving the streets, lanes or alleys therein, or for sinking

wells or erecting pumps, which may appear for the benefit of a particular part or district," is not confined to any particular district, but may be for the benefit of the whole city. The preservation of the health of such particular part of the city is a benefit within the meaning and scope of the Act.

481 * The legality of laying such tax, does not depend upon whether the paving does, or does not in fact, benefit the particular district taxed, but upon the object, the motive of the corporation in laying the tax, and the paving to be done. (a)

In an ordinance providing for such paving, and the imposition of a special tax, it is not necessary that it should be expressly for the benefit of the particular district; if nothing appears to the contrary, such an exercise of the special taxing power will be held to have been in pursuance of the authority given by the charter.

But where an ordinance provides for the paving of a street, and the imposition of a special tax for the paving of such district, which paving appears from the ordinance to be for the general benefit of the city, and not for the benefit of the particular district, it is not in pursuance of the authority conferred by the charter, and is void. (c)

So upon the construction of the 13th sec. of the Ordinance of 1807, which declares "that if the Commissioners of Health at any time report in writing to the City Commissioners, that a street, lane, or alley in the City of Baltimore, is a nuisance, and danger the health thereof," &c. it was held that the words "which will endanger the city," do not relate to the City of Baltimore, so as to make it a nuisance which will endanger the city, but that it relates to an alley, &c. and means a nuisance that will endanger the health of the city, &c. and the ordinance is clearly within the power given by the charter.

A corporation must act within the limits of its delegated powers, and cannot go beyond it, yet it ought not by construction to mean what is not clearly expressed, but when its ordinance admits of two constructions, they should receive that which is most beneficial to the public, and the power given, and not that which is in violation of the charter.

Where one Board of Commissioners, in the execution of its duties, is required to report in writing to another Board of Commissioners, and these boards are united without any change being prescribed as to the duties of each, the trusts formerly confided to each of them, and the written report as above directed, was necessarily directed to the Board of Commissioners.

Under the 13th section of the Ordinance of the 9th M. C. Commissioners and Commissioners of Health, were in a positive and decided opinion that "a nuisance exists in any street, lane, or alley in the City of Baltimore, which will endanger the health thereof."—An entry in their books of their decision.

(a) Affirmed in *Burns vs. Baltimore*, 48 Md. 203. See also *6 H. & J. 310; Baltimore vs. Howard*, *Ibid.* 316.

(b) Affirmed in *Baltimore vs. Scharf*, 54 Md. 514: *See more vs. Hopkins Hospital*, 56 Md. 27.

(c) Affirmed in *Burns vs. Baltimore*, 48 Md. 205.

(d) See *Murphey vs. Barron*, 1 H. & G. 182.

Certificates in their warrants, which they are directed to issue for the collection of the tax imposed to remove the nuisance, of the existence of the nuisances and of their characters would be sufficient; but where they say in each warrant that they conceive the street mentioned, to be in a state of nuisance, which might endanger the health of the city, thus referring to the health of the city generally, not to that of a particular part, it is not such an opinion * as the ordinance requires, and the tax imposed under it cannot be enforced. **482**

It is not competent to prove by oral testimony, the existence of facts to be ascertained by public commissioners, preparatory to laying a tax, which such commissioners are required to certify in writing.

The action for money paid, laid out, and expended, must be founded upon a contract, express or implied. (*d*)

No person can by a voluntary payment of the debt of another, without his authority, make himself a creditor of the person whose debt is thus paid.

If one is compelled, or is in a situation to be compelled to pay the debt of another, as in the case of a surety and does pay it, the law implies a promise on the part of him for whom the money is paid, on which an action may be sustained, for in such case it is not a voluntary, but a compulsory payment. (*e*)

A tax imposed by a municipal corporation cannot be recovered on a count for money paid, laid out, and expended, although such corporation has paid the cost of the improvement for which the tax was created. (*f*)

Nor can the cost of such improvement, or any part thereof, be recovered from a defendant, liable to pay tax therefor on a count for work and labor, where the ordinance under which the work was done, has not been properly pursued, so as to create a legal liability in the defendant. (*g*)

APPEAL from Harford County Court. This was an action of assumpsit, originally brought in Baltimore County Court, but on suggestion, &c. of the defendant (the intestate of the appellee) was removed to Harford County Court. After the cause was so removed, the death of the original defendant was suggested, and the present appellee was made defendant, as his administrator *de bonis non*. The action was brought to recover the sum of \$1,880.35, alleged to be due to the plaintiffs (the appellants) for certain paving taxes assessed upon the property of the intestate, by virtue of the corporate powers vested in the plaintiffs by certain Acts of Assembly. The declaration contains six counts—four special counts, and two general counts. The first count was for a paving tax, on application, &c. imposed the

(*e*) See *Baltimore vs. Lefferman*, 4 Gill, 425.

(*f*) See *Baltimore vs. Howard*, 6 H. & J. 317; *Dugan vs. Baltimore*, *infra*, m. p. 499.

(*g*) Cited in *Clemens vs. Baltimore*, 16 Md. 212, where it was held that presentation of a bill for paving taxes to the defendant, his acquiescence therein and his promise to pay it, constitute an admission by him that the necessary preliminary steps had been taken by the city, and that the paving had been done, and would authorize the jury to find a verdict for the plaintiff.

24th of April, 1809, on Forrest street, &c. amounting to \$ second count was for a paving tax to remove a nuisance, the 20th of July, 1812, on Barre street, between Light and streets, amounting to \$728.28. The third count was for a si imposed the 29th of July, 1812, on Forrest street, between

483 York streets, amounting to \$496.07. * The fourth for paving taxes generally, amounting to \$1,880.35, aggregate of the sums mentioned in the three first count declaration. The fifth count was for money paid, laid ou pended; and the sixth count was for work and labor. The pleaded *non assumpsit*, and issue was joined.

1. At the trial the plaintiffs gave in evidence an Act of eral Assembly of this State, passed at November Ses entitled, "an Act to erect Baltimore Town, in Baltimore C a city, and to incorporate the inhabitants thereof." 17 And also another Act of the said General Assembly, p vember Session, 1797, entitled. "A supplement to th tled an Act to erect Baltimore Town, in Baltim into a city, and to incorporate the inhabitants the ch. 54.) They further gave in evidence an ordin Mayor and City Council of Baltimore, entitled, "An appoint city commissioners, and prescribing their dutie March the 9th, 1807. And also gave in evidence anothe entitled, "An ordinance to unite the powers and dutie commissioners and commissioners of health," approve March, 1807. They also gave in evidence, that during Henry Stouffer, John Bankson, William C. Gouldsmit H. Gatchell, were city commissioners, duly appointed and that the said John Bankson, William C. Gouldsmit H. Gatchell, have been dead several years; and also g that Edward Johnson was in said year, the Mayor Baltimore, duly elected and qualified. That on the 1808, the following petition was presented to, and i said Henry Stouffer, &c. commissioners as aforesaid.

"The City Commissioners, Gentlemen—The sub and occupiers of houses and lots situated on Forrest the southernmost boundary line of the city and desirous to have the same paved as soon as possible number of petitioners, and among others the or Hughes.

484 * On the back of which said petition wa "No 1. Petition for paving Forrest street. 1808. Ordered to be surveyed." They further ga following entries made in the book containing the said commissioners, viz. Baltimore, 8 May, 180 met. Present, full board. Issued warrant for th street, \$1,584.87, \$1,503.57, \$3,088.44." They evidence, that upon said application the said cor

to pave said street, and obtain the verbal assent of the mayor of said city to such pavement; they also offered parol evidence, that the signers of said application or petition, constituted a majority of the proprietors and tenants inhabiting on said street, between the limits so required to be paved; and that Christopher Hughes, one of the proprietors, was the same Christopher Hughes who signed said application or petition; and also gave in evidence the following warrants: "City of Baltimore, *set.* The city commissioners having been requested by a majority of the proprietors of lots bounding on Forrest, between York street and the outlines of the city, and tenants inhabiting thereon, by their written application of the fifteenth day of June last, and having determined on the propriety of paving said street front of said lots, agreeably to their request, did cause to be made the following list of the names of the persons who are liable to pay the tax by law directed to be levied for paving the said street, it being the width of eighty-two feet six inches." Here follows the names of sundry persons, and amongst others, Christopher Hughes, \$656.

"City of Baltimore, to wit: By virtue of an ordinance, entitled, An ordinance directing the manner of collecting and appropriating the money levied for paving the streets, lanes and alleys, in the City of Baltimore, and also an ordinance, entitled, An ordinance for more equal assessing and levying the paving tax on the streets, lanes and alleys, in the City of Baltimore, we the subscribers, city commissioners, do hereby authorize and direct you to collect from the several persons whose names are hereto above annexed, the several sums of money opposite their respective names, being the street tax on Forrest street, between * York street and the outlines of the city. That you will make collection aforesaid, and pay the **485** same to the register of the city, agreeably to the directions of the ordinance aforesaid, and this shall be your sufficient warrant therefor. Given under our hands and seals this 24th day of April one thousand eight hundred and nine." Signed and sealed by Henry Stouffer, &c. the city commissioners. "8th May, 1809. Approved, Edward Johnson. To the Collector of the City of Baltimore, Benjn. Fowler, Esquire." On the back of which said warrant was thus endorsed: "Warrant for paving Forrest street, dated 8th May, 1809. Entered." They also gave in evidence that the said street then was, and still is, a public street in said city, and that the city commissioners caused that part of the said street called Forrest street, between York street, and the outlines of the city, to be paved, and that the proportion of the paving tax of the said Christopher Hughes for paving said part, amounted to \$656, and that he paid on account thereof, when the paving was done, the sum of \$500. They then offered in evidence that Henry Stouffer, &c. were city commissioners, and commissioners of health, in the city aforesaid, in the year 1812, duly appointed and qualified as such, that Edward Johnson was then and during the said year the mayor of said city, duly

elected and qualified as such. The *plaintiffs* then gave in evidence the following entries made *upon* the books of the commissioners aforesaid, viz. "Baltimore, 29th June, 1812. Commissioners met. Present, full board. Barre, between Light and Charles street and Forrest, between Lee and York streets, declared by the board of health to be in a state of nuisance, which cannot be removed without paying the same. Resolved, that the same be forthwith paved. And that the books in which said entries are found and taken from are the books, and only books, of the commissioners of health and city commissioners, in which all their proceedings are entered. The plaintiffs further gave in evidence the following warrants: "City of Baltimore, *act.* We the city commissioners, as also commissioners of health, conceiving Barre street, between Charles and Light streets to be in a state of nuisance, which might endanger the health of the city, and which nuisance in our opinion cannot be removed but by paving, do adjudge and determine that the same be paved front of the lots bounding thereon, having caused to be made the following list of the names of the persons who are liable to pay the tax by law directed to be levied for paving said street front said lots." In that list is the name of Christopher Hughes, \$728.

"City of Baltimore, *act.* By virtue of an ordinance, entitled, An ordinance directing the manner of collecting and appropriating the money levied for paving the streets, lanes and alleys, in the City of Baltimore, as also an ordinance, entitled, An ordinance for the more equal assessing and levying the paving tax on the streets, lanes and alleys, in the City of Baltimore, and agreeably to an ordinance respecting nuisances, we, the city commissioners, do hereby authorize and direct you to collect from the several persons whose names are hereto above annexed, the several sums of money opposite their respective names, being the paving tax on Barre street, between Charles and Light streets. That you will make the collection aforesaid, and pay the same to the register of the city, agreeably to the ordinances aforesaid, and this shall be your sufficient warrant therefore. Given under our hands and seals this twentieth day of July, 1812. Signed and sealed by Henry Stouffer, &c. the city commissioners. "23d July, 1812. Approved Edward Johnson, Mayor." To the collector City of Baltimore. On the back of which said warrant was thus endorsed—"Warrant for paving Barre street between Charles and Light streets. Dated 23d July, 1812. Ent."

"City of Baltimore, *act.* We the city commissioners, as also commissioners of health, conceiving Forrest street, between Lee and York streets, to be in a state of nuisance, which might endanger the health of the City, and which nuisance, in our opinion, cannot be removed but by paving, do adjudge and determine, that the same be paved front of the lots bounding thereon, and have caused to be made the following list of the names of the persons who are liable to pay the tax by law directed to be levied for paving said street. In that list Christopher Hughes' tax was \$496.07. A similar wa

rant to that last mentioned was issued on the 29th of July, 1812, by the commissioners for collecting * the tax, and which was approved by the Mayor on the same day. On the back of which **487** said warrant was thus endorsed—"Warrant for paving Forrest street, between Lee and York streets, dated 29th July, 1812. Ent'd." The plaintiffs also gave in evidence, that Barre street, between Charles and Light Streets, and Forrest street between Lee and York streets, then were, and still are, public streets in the said City of Baltimore, and that said Christopher Hughes was in possession, and claimed title to the property on Barre and Forrest streets, for about thirty years, at the time the said streets were paved, and that the city commissioners aforesaid, caused that part of Barre street, between Charles and Light streets, to be paved, and that the said proportion of the said paving tax therefor of the said Christopher Hughes, amounted to \$728.28, as assessed to him by the city commissioners; and that the said commissioners caused that part of Forrest street, between Lee and York streets, to be paved, and that the proportion of the said paving tax, as charged by the city commissioners to the said Christopher Hughes, amounted to \$496.07. The plaintiffs further offered in evidence, by Elisha T. Bailey, that he contracted with the said commissioners to pave the said parts of the said two streets last mentioned; that he did pave the same, and received payment therefor from the plaintiffs, and that the said Christopher Hughes was frequently present on the said parts of streets, when the witness was so paving the same, and requested a part thereof to be done in a particular manner, by objecting to certain stones used as improper, and requesting him to put in others, which the witness accordingly did: that the first part of said work was commenced in July, 1812, and finished either the last of July or the first of August. Whereupon he immediately commenced the paving the other street, and finished the same in the fall of the year; that the said Christopher Hughes, when the said paving was finished, offered to pay the said Bailey for paving on said streets, so performed by him, provided he would take unimproved lots in payment therefor, which the said Bailey refused to do. The plaintiffs further gave in evidence that the said Henry Stouffer, &c. mentioned as the city commissioners, are the same persons * who **488** composed the board of health of the said City, and were commissioners of health at the periods and in the year before mentioned; and they further gave evidence, that the several warrants herein before mentioned, were duly approved by the Mayor of the City of Baltimore, before the same were issued and delivered to the collector of said City.

The defendant then prayed the Court to instruct the jury, that the plaintiffs were not entitled to recover for the paving of Barre street, between Light and Charles streets, and Forrest between Lee and York streets—1st. Because there is no evidence that the commis-

sioners of health, or board of health, did at any time ascertain that a nuisance existed in the said streets, which would endanger the health of the City of Baltimore; and also because there is no evidence that the said commissioners of health, or board of health, did at any time report in writing to the city commissioners, that a nuisance existed in the said streets, which will or would endanger the health of the City of Baltimore. 2d. And because the plaintiffs, by virtue of the thirteenth section of their ordinance of the 9th of March, 1807, entitled, "An ordinance to appoint city commissioners and prescribing their duties," could not confer a power on the said city commissioners to assess or levy a tax on any particular part or district of the City of Baltimore, or the proprietors or owners of such part or district, for the purpose of preventing or removing a nuisance, which will endanger the health of the City of Baltimore. 3d. Because it is in evidence, and uncontradicted, by the books and proceedings of the commissioners of health, or board of health, and of the city commissioners, that Barre street between Light and Charles streets, and Forrest street between Lee and York streets, were declared by the board of health to be in a state of nuisance, and that the commissioners of health had not declared the said streets to be in a state of nuisance, which will or would endanger the health of the City. Which instruction the Court [ARCHER, C. J.] gave to the jury. The plaintiffs excepted.

2. The plaintiffs, in addition to the evidence set forth in the preceding bill of exceptions, offered in evidence by Henry
489 *Stouffer, a witness sworn on the trial on the part of the plaintiffs, that he was the only survivor of the board of city commissioners, and commissioners of health, for the year 1812; and the plaintiffs further offered in evidence, by the said witness, that in the month of July, 1812, Barre street between Light and Charles streets, and Forrest street between Lee and York streets, were entirely on made ground, and that a nuisance existed in the said part of the said streets, which endangered the health of the City of Baltimore, and that the same could not be effectually removed without paving the same. To the admissibility of which evidence, the defendant objected; and the Court were of opinion, that the said testimony was inadmissible, and refused to let the same go to the jury. The plaintiffs excepted.

3. The plaintiffs further prayed the Court to instruct the jury, that upon the evidence contained in the preceding bills of exceptions, the plaintiffs are entitled to recover in this action the proportion of the paving taxes chargeable to the said Christopher Hughes in his lifetime, for the paving of Barre street, between Light and Charles streets, to wit, the sum of \$728.28, and for the paving of Forrest street, between Lee and York streets, to wit, the sum of \$496.07, under the fifth and sixth counts, in their declaration for money paid, laid out and expended, and for work and labor done, and materials

found and provided; which instructions the Court refused to give. The plaintiffs excepted; and the verdict for the plaintiffs being only for the sum of \$318, and judgment thereon rendered, they appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and STEPHEN, JJ.

Taney (Attorney-General,) and *J. Scott*, for the appellants, contended that the Court below erred in giving the instructions prayed for by the defendant, as set forth in the first bill of exceptions—1. Because the nature and character of the nuisances alleged to exist in Barre street, between Light and Charles streets, and in Forrest street, between Lee and York streets, were sufficiently ascertained by the proceedings of the board of health * and city commissioners, according to the ordinance of the 9th of March, 1807, **490** (*Young's Ed.* 60, *sec.* 13,)—the board of health and city commissioners being composed of the same persons. *Ib.* 165.

2. Because the powers and duties of the board of health and city commissioners, being united by the ordinance (*Ib.* 165,) that part of the 13th section, which requires a report in writing from the board of health to the city commissioners, of the existence and nature of the alleged nuisance must be considered as repealed—such a report being absurd and unnecessary.

3. Because the existence and character of the nuisance, being ascertained by the tribunal competent to decide the question, and the plaintiffs having the power to tax as well as pave, by the Act of 1797, ch. 54, in the absence of proof to the contrary, it must be understood to be a lawful exercise of those powers.

4. Because the nature of the nuisance shows that it was for the benefit of those districts that it should be removed; and the competent authorities had decided, that it could only be done by paving.

5. Because the power to prevent and remove nuisances, to pave, and to tax for the said paving, have been properly exercised by the plaintiffs by their officers and servants.

6. Because the nature and character of the alleged nuisances are sufficiently ascertained by the commissioners of health and city commissioners, in the warrants issued by them, and no other ascertainment thereof was necessary.

7. The appellants also contended, that the Court below erred in refusing to grant the prayer of the plaintiffs, contained in the third bill of exceptions; because they offered evidence, proper to go to the jury under the fifth and sixth counts in the declaration, to show the assent of the defendants' intestate to the paving of Barre street, between Charles and Light streets, and of Forrest street, between Lee and York streets, and the payment for the same by the plaintiffs; and that upon such assent the plaintiffs were entitled to re-

cover from the defendant for such paving, and for the money so laid out and expended.

They referred to the Acts of Assembly and ordinances stating the bills of exceptions. Also to *The Mayor, &c. vs. A*
491 *& Johnson*, 6 H. & J. 380, and *The Mayor, &c. vs. Howard*
 94.

R. Johnson, for the appellee. 1. The character of the nuisance was not sufficient to justify the paving, under the ordinance of 9th of March, 1807, sec. 13. 2. The paving was not such as authorized the imposition of the tax laid under the Act of 1797, ch. 54. 3. The plaintiffs were not entitled to recover under the general counts in the declaration for work and labor done, &c.

BUCHANAN, C. J. delivered the opinion of the Court. A recovery by the plaintiffs of the taxes imposed under the 13th section of the ordinance of the 9th of March, 1807, is resisted by the defendant on two grounds.

1st. That the power given by the ordinance has not been well executed.

2d. That the ordinance itself is not authorized by the charter.

The second ground relied upon involves the construction both of the charter and the ordinance, and will be first examined.

The second section of the Act of 1797, ch. 54, a supplement to the Act incorporating the City of Baltimore, gives to the corporation power to pass all ordinances necessary for paving and keeping the streets, &c. in repair, "and to tax any particular part or district of the city for paving the streets, lanes or alleys therein, or for erecting wells, or erecting pumps, which may appear for the benefit of a particular part or district." In the case of *The Mayor & Council of Baltimore vs. Moore and Johnson*, 6 H. & J. 380, it was decided by this Court that the word *which* in that provision related as well to the paving the streets, lanes and alleys as to the sinking of wells and erecting pumps, and that the corporation had authority to tax any particular part or district of the city for paving the streets, lanes or alleys therein, which might be for the benefit of such particular part or district. The result of which that conclusion was arrived at need not be stated in this place. A different construction however could have been contemplated to give to the corporation power to tax any particular part or district of the city for any purpose other than the general benefit and not for the benefit of the particular part or district taxed; which, under a different construction, would be the effect of the second section of the Act of 1797, ch. 54. Under this restricted construction, limiting the power of the corporation to tax any particular part or district of the city for paving the streets, lanes and alleys therein, to a paving

492 in this place. A different construction however could have been contemplated to give to the corporation power to tax any particular part or district of the city for any purpose other than the general benefit and not for the benefit of the particular part or district taxed; which, under a different construction, would be the effect of the second section of the Act of 1797, ch. 54. Under this restricted construction, limiting the power of the corporation to tax any particular part or district of the city for paving the streets, lanes and alleys therein, to a paving

cover from the defendant for such paving, and for the money so paid, laid out and expended.

They referred to the Acts of Assembly and ordinances stated in * the bills of exceptions. Also to *The Mayor, &c. vs. Moore* 491 & *Johnson*, 6 H. & J. 380, and *The Mayor, &c. vs. Howard*, *Ib.* 94.

R. Johnson, for the appellee. 1. The character of the nuisance was not sufficient to justify the paving, under the ordinance of the 9th of March, 1807, sec. 13. 2. The paving was not such as authorized the imposition of the tax laid under the Act of 1797, ch. 54. 3. The plaintiffs were not entitled to recover under the general counts in the declaration for work and labor done, &c.

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be, or appear to be for the benefit of such particular district, and not for the general benefit of the city, which ought to be paid for out of the general fund, and not by the imposition of a special tax upon any particular part of the city, we think the corporation is not confined to any particular description of benefit, such as the ordinary benefit and advantage of paved streets; and that the preservation of the health of such particular part of the city, is a benefit within the meaning and scope of the Act.

The legality of levying the tax does not depend upon whether the paving does or does not in fact benefit the particular district that is taxed, but upon the object, the motive of the corporation in causing the paving to be done. And in an ordinance providing for such paving, and the imposition of such a special tax, it is not necessary that it should be expressly stated to be for the benefit of the particular district; but if nothing appears to the contrary, such an exercise of the special taxing power will be taken to have been in pursuance of the authority given by the charter. It will be presumed that the corporation did not exceed its powers, but imposed the tax for the purpose only for which the charter authorizes it to be imposed, and that the paving appeared to the City Council to be for the benefit of the particular district.

But where an ordinance provides for the paving a street, &c. in a particular district, and the imposition of a special tax for that purpose on such district, which paving appears by the * ordinance to be for the general benefit of the city, and not for the benefit of the particular district, such an ordinance is not in pursuance of the authority conferred by the charter, and is void. And such it is contended is the character of the 13th section of the ordinance of the 9th March, 1807, providing for the imposition of the taxes, the recovery of which in this suit is resisted. **493**

The provision of that section is in these words, "that if the commissioners of health shall at any time report in writing to the city commissioners that a nuisance exists in any street, lane or alley in the City of Baltimore, which will endanger the health thereof, and the city commissioners, upon a full examination thereof, should be of the same opinion, and that the same cannot be effectually removed without paving such street, lane or alley, they are hereby authorized and required to proceed to the paving of such street, lane or alley, and to issue their warrant under their hands to the city collector, directing him to collect the tax which may be imposed for the paving the same, &c.

It is supposed that it appears upon the face of this ordinance that the nuisance here authorized to be removed by paving the street, &c. in which it may be found to exist, is such a nuisance only as, in the opinion of the commissioners of health and the city commissioners, will endanger the health of the city generally, and not of the particular district in which the paving is authorized to be done, and the

Second, that the ordinance requires the nuisance to be of character, as will, in the opinion of the commissioners, endanger health, &c. and that the commissioners have not so stated.

There is nothing in the first of these objections. The ordinance of the 22d of March, 1807, uniting the powers and duties of the commissioners and commissioners of health, provides for the appointment of four persons to be city commissioners and commissioners of health, with all the powers and duties united in them, of the commissioners of health and city commissioners, and surely the form of a written report by them to themselves was necessarily dispensed with. Besides there would be an inconsistency between the ordinances, the one uniting the two bodies into one, and the other requiring the one to make a report to the other, when no separate bodies existed, and the ordinance of the 22nd of March, 1807, as are inconsistent with any thing contained in it. An affidavit of the commissioners of their decision is not required, their certificates in their warrants of the existence of the nuisance, and their characters, would have been sufficient, if in other respects the ordinance was complied with. But the ordinance has not been complied with; the warrants of the commissioners should, to guard against the ordinance, have contained statements of the existence of nuisances in the respective streets specified, which would in their warrants endanger the health thereof, and not that they might endanger the health thereof. A positive and decided opinion is required, and not an expression of a doubt, as to the dangerous character of the nuisance to be removed. And it is evident from the terms used by the commissioners, that they had formed no decided opinion on the matter. They say in each warrant, that they conceive the street mentioned to be in a state of nuisance which might endanger the health of the city, apart from the danger they speak of to the health of the neighborhood instead of the health of the particular street, which is the departure from the provision of the ordinance; the opinion expressed is not such as the ordinance requires. The nuisance authorized to be removed, is required to be such, as in the opinion of the commissioners will be dangerous, and not such as may possibly be dangerous; and the second objection is well taken.

The second exception was properly abandoned at the trial. The ordinance requiring the evidence of the existence of a nuisance, and of its dangerous character and tendency, to be in writing, the plaintiff was not competent to prove it by oral testimony in bar.

The action for money paid, laid out and expended, must be supported upon a contract express or implied, and it is a settled rule, that a person can by a voluntary payment of the debt of another,

which might endanger the health of the city.” And it is probable that the language of the warrants * and of the ordinance may have been confounded by the counsel. The words of the ordinance are, “that if the commissioners of health shall at any time report in writing to the city commissioners that a nuisance exists in any street, lane or alley in the City of Baltimore, which will endanger the health thereof,” &c. Not in terms the health of the city, but thereof; and the question is whether the word *thereof* must be held to relate to the City of Baltimore, or may refer to the street, lane or alley in which a nuisance may be found to exist. **495**

The power given by the charter under which this ordinance was passed, is, “to tax any particular part or district of the city, for paving the streets, lanes or alleys therein, or for sinking wells or erecting pumps, which may appear for the benefit of such particular part or district.” Now it has never been pretended, that the word *therein* in that clause related to the city, and meant for paving the streets, lanes or alleys, in the city. But it has always been considered, (and properly,) that it related to the particular part or district of the city to be taxed, and meant for paving the streets, lanes or alleys in such particular part or district. And the only question raised on that clause of the charter, in the *Mayor, &c. vs. Moore & Johnson* was, whether the latter part of it, “which may appear for the benefit of such particular part or district,” related to the sinking of wells and erecting pumps, or extended also to the paving the streets, &c. So here we think that the word *thereof* in the ordinance, does not relate to the City of Baltimore, so as to make it mean a nuisance which will endanger the health of the City of Baltimore: But that it relates to any street, lane or alley, &c. and means a nuisance that will endanger the health of such street, &c. The words *in the City of Baltimore* being only used as descriptive of where the street, &c. lies. And that there is nothing appearing upon the face of the ordinance, to show that the general benefit of the city, is the object of the paving provided for, and not the benefit of the particular district to be taxed.

This construction, brings the ordinance clearly within the power conferred by the charter, and although it is true, that a corporation must act within the limits of its delegated authority, * and cannot go beyond it, yet it ought not by construction, to be made to mean what is not clearly expressed; but when an ordinance will admit of two constructions, it should receive, that which is consistent with the power given, and not that which is in violation of it. **496**

The other ground relied upon by the defendant, is, that conceding the ordinance to be justified by the charter; yet the power given by it, has not been well executed, and two objections are raised; first, that by the ordinance, a report in writing is required of the existence of a nuisance, &c. by the commissioners of health, to the commissioners of the city, which does not appear to have been made.

Second, that the ordinance requires the nuisance to be of such a character, as will, in the opinion of the commissioners, endanger the health, &c. and that the commissioners have not so stated.

There is nothing in the first of these objections. The ordinance of the 22d of March, 1807, uniting the powers and duties of the city commissioners and commissioners of health, provides for the appointment of four persons to be city commissioners and commissioners of health, with all the powers and duties united in them, of the commissioners of health and city commissioners, and surely the formality of a written report by them to themselves was necessarily dispensed with. Besides there would be an inconsistency between the two ordinances, the one uniting the two bodies into one, and the other requiring the one to make a report to the other, when no such separate bodies existed, and the ordinance of the 22nd of March, 1807, expressly repeals all such parts of the ordinance of the 9th of March, 1807, as are inconsistent with any thing contained in it. An entry in the books of the commissioners of their decision is not required, and the certificates in their warrants of the existence of the nuisances and of their characters, would have been sufficient, if in other respects the ordinance was complied with. But the ordinance has not been complied with; the warrants of the commissioners should, to gratify the ordinance, have contained statements of the existence of nuisances in the respective streets specified, which would in their opinion

497 endanger the * health thereof, and not that they might do so. A positive and decided opinion is required, and not the expression of a doubt, as to the dangerous character of the nuisance to be removed. And it is evident from the terms used by the commissioners, that they had formed no decided opinion on the subject. They say in each warrant, that they conceive the street mentioned, to be in a state of nuisance which might endanger the health of the city, apart from the danger they speak of to the health of the city, instead of the health of the particular street, which is of itself a departure from the provision of the ordinance; the opinion they express, is not such as the ordinance requires. The nuisance authorized to be removed, is required to be such, as in the opinion of the commissioners will be dangerous, and not such as may by possibility be dangerous; and the second objection is we think well taken.

The second exception was properly abandoned at the argument. The ordinance requiring the evidence of the existence of a nuisance, and of its dangerous character and tendency, to be in writing, the plaintiff was not competent to prove it by oral testimony at the bar.

The action for money paid, laid out and expended, must be founded upon a contract express or implied, and it is a settled rule, that no person can by a voluntary payment of the debt of another, without

his authority, make himself a creditor of the person whose debt is thus paid; but if one is compelled, or is in a situation to be compelled to pay the debt of another, as in the case of a surety, and does pay it, the law implies a promise on the part of him for whom the money is paid, on which an action may be sustained, for in such case, it is not a voluntary but a compulsory payment.

In this case there was no debt due by the defendants' intestate, and the payment made by the plaintiffs was on account of a contract entered into between the commissioners and the man who did the paving. But if there had been a debt due by the defendants' intestate to the workman who did the paving, which the plaintiffs were not compelled to pay, a voluntary payment * by the plaintiffs without the authority or request of the defendants' intestate **498** could not raise an assumpsit against him; and there is no evidence of any such authority or request. Or if the defendants' intestate was indebted to the plaintiffs on account of the taxes imposed, that liability would not sustain a count for money paid, laid out and expended, which is the fifth count in the declaration in this case.

And we can perceive no ground on which the construction prayed for to the jury, that the plaintiffs were entitled to recover on the sixth count for work and labor done, &c. could have been properly given. The defendants' intestate was under no legal obligation imposed by the ordinance, to pay for the paving done; and the work was not done at his instance, but by the plaintiffs, under and in pursuance of one of their own ordinances, and in the supposed exercise of their corporate powers.

We concur therefore in opinion with the Court below on all the bills of exceptions.

Judgment affirmed.

NOTE.—The doctrine that no person can by a voluntary payment of the debt of another, without his authority make himself a creditor of the person whose debt is thus paid, has been qualified by the Act of 1829, ch. 51, which enacts "that any assignee or assignees, *bona fide* entitled to any judgment, bond, specialty or other *chose in action* for the payment of money by assignment in writing, signed by the person or persons authorized to make the same, may by virtue of such assignment, sue and maintain an action or actions, execution or executions, in any Court of law or equity in this State, as the case may require, in his, her or their name or names against the obligor or obligors, debtor or debtors, therein named, saving and reserving to the defendant or defendants, all such legal or equitable defence as might or could have been had or maintained against the assignor or assignors at the time, and before notice of the assignment, in the same manner and to the same extent as if no such assignment had been made."—REPS.

the 1st of June next, after the passage of the ordinance, no action would lie; and that the delivery, &c. by the collector to the applicant is directed by the ordinance, this action cannot be maintained in support of this proposition, the Stat. of 2d Geo. 2d and the decisions under it are relied on. But the ordinance is not perceived. The language of the Stat. 2d Geo. 2d is permissive; it provides that no attorney or solicitor shall maintain any action or suit, until the expiration of one month after he shall have delivered a bill of his fees, to be charged, &c. thus expressly declaring, that no action shall be brought or maintained, until the provision of the ordinance is complied with; but that is not the effect of the ordinance; it neither expressly forbids the bringing of a suit to be brought, in the event of the tax not being paid by the time prescribed. It has no effect in prohibiting the bringing of a suit, but only in prescribing the mode of collecting the tax by a distress and sale of the goods of the corporation, is seen that by the 10th section of the charter, the mode of collecting the taxes, imposed by the corporation, is to be by distress and sale of the goods of the person liable for them. The 4th section of the ordinance provides that the collector shall prescribe his duties, after the passing of the ordinance, providing that he shall deliver an account of his assessment and tax to the taxable person, on or before the first of June next, after the passing of the ordinance, and that he shall go on to direct him, if the tax should not be paid by the first of July following, to proceed without delay to recover the same by distress and sale of the goods, and not by suit, which he had no authority to do. It is true that the collector was not authorized to institute proceedings by distress and sale of the goods, without having first delivered an account of the same to the taxable person, and that he was not entitled to that notice, before he could proceed against his property, but that he could not be sued by the collector, it would not be for the amount of the taxes due. His liability to be sued or not, in no manner affected by the ordinance. In the *Mayor and City Council vs. Howard*, decided by this Court in relation to the 10th section of the ordinance, 6 H. & J. section of

was employed by the said Thomas Rogers as a clerk and agent to assist in the collection of the same, and that some time in the year 1818, the said Peregrine Welsh called on the defendant and demanded payment of the said sum of \$160.92, due as aforesaid, but that the said defendant refused to pay the same, alleging that the Mayor and City Council of Baltimore were indebted to him. Whereupon, the said defendant prayed the opinion and direction of the Court to the jury, that the plaintiffs having offered no evidence to prove, that the said collector made and delivered to the said defendant, an account in writing of the assessment and tax of the said defendant, containing the items in words at length, and the amount thereof in figures, before the first day of June, in the year 1817, or at any time before the commencement of this suit, were not entitled to recover in this action; and the defendant further prayed the opinion and direction of the Court to the jury, that upon the evidence given in this cause, the plaintiffs were not entitled to recover in this action; which opinions and directions the Court refused to give to the jury, but were of opinion and so directed the jury, that if the jury believed the evidence given in this cause, the plaintiffs were entitled to recover. The defendant excepted, and the verdict and judgment being against him, he prosecuted this appeal.

The cause was argued before BUCHANAN, C. J., EABLE, MARTIN, and ARCHER, JJ.

R. Johnson, for the appellant. *J. Scott*, for the appellee.

BUCHANAN, C. J. delivered the opinion of the Court. By the 10th section of the Act of 1796, the Act of incorporation * of the City of Baltimore, authority is given to the person or persons **501** appointed to collect any tax imposed, in virtue of the powers granted by that Act, to collect the same by distress and sale of the goods of the persons chargeable therewith; with a provision, that if the tax imposed, shall be chargeable on real property, it may be recovered by action of debt, or attachment, in case no goods can be found liable to be distrained upon.

This suit was brought to recover an amount of taxes, claimed to be due and owing by the appellant, for the year 1817, in virtue of an ordinance passed by the corporation on the 27th of March, in the year 1817: "To impose a tax on the real and personal property within the City of Baltimore." It is not contended, that the corporation had not the power by the charter to impose taxes; nor is it denied that the particular ordinance imposing the tax in question, was passed in pursuance of the powers derived under the charter. But it is urged, that unless the provisions of the fifth section of the ordinance, directing the collector to deliver to each taxable person, &c. an account in writing, of his assessment and tax, containing the items in words at length, and the amount thereof in figures, before

sioners of health, or board of health, did at any time ascertain that a nuisance existed in the said streets, which would endanger the health of the City of Baltimore; and also because there is no evidence that the said commissioners of health, or board of health, did at any time report in writing to the city commissioners, that a nuisance existed in the said streets, which will or would endanger the health of the City of Baltimore. 2d. And because the plaintiffs, by virtue of the thirteenth section of their ordinance of the 9th of March, 1807, entitled, "An ordinance to appoint city commissioners and prescribing their duties," could not confer a power on the said city commissioners to assess or levy a tax on any particular part or district of the City of Baltimore, or the proprietors or owners of such part or district, for the purpose of preventing or removing a nuisance, which will endanger the health of the City of Baltimore. 3d. Because it is in evidence, and uncontradicted, by the books and proceedings of the commissioners of health, or board of health, and of the city commissioners, that Barre street between Light and Charles streets, and Forrest street between Lee and York streets, were declared by the board of health to be in a state of nuisance, and that the commissioners of health had not declared the said streets to be in a state of nuisance, which will or would endanger the health of the City. Which instruction the Court [ARCHER, C. J.] gave to the jury. The plaintiffs excepted.

2. The plaintiffs, in addition to the evidence set forth in the preceding bill of exceptions, offered in evidence by Henry
489 *Stouffer, a witness sworn on the trial on the part of the plaintiffs, that he was the only survivor of the board of city commissioners, and commissioners of health, for the year 1812; and the plaintiffs further offered in evidence, by the said witness, that in the month of July, 1812, Barre street between Light and Charles streets, and Forrest street between Lee and York streets, were entirely on made ground, and that a nuisance existed in the said part of the said streets, which endangered the health of the City of Baltimore, and that the same could not be effectually removed without paving the same. To the admissibility of which evidence, the defendant objected; and the Court were of opinion, that the said testimony was inadmissible, and refused to let the same go to the jury. The plaintiffs excepted.

3. The plaintiffs further prayed the Court to instruct the jury, that upon the evidence contained in the preceding bills of exceptions, the plaintiffs are entitled to recover in this action the proportion of the paving taxes chargeable to the said Christopher Hughes in his lifetime, for the paving of Barre street, between Light and Charles streets, to wit, the sum of \$728.28, and for the paving of Forrest street, between Lee and York streets, to wit, the sum of \$496.07, under the fifth and sixth counts, in their declaration for money paid, laid out and expended, and for work and labor done, and materials

found and provided; which instructions the Court refused to give. The plaintiffs excepted; and the verdict for the plaintiffs being only for the sum of \$318, and judgment thereon rendered, they appealed to this Court.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and STEPHEN, JJ.

Taney (Attorney-General,) and *J. Scott*, for the appellants, contended that the Court below erred in giving the instructions prayed for by the defendant, as set forth in the first bill of exceptions—1. Because the nature and character of the nuisances alleged to exist in Barre street, between Light and Charles streets, and in Forrest street, between Lee and York streets, were sufficiently ascertained by the proceedings of the board of health * and city commissioners, according to the ordinance of the 9th of March, 1807, **490** (*Young's Ed.* 60, *sec.* 13,)—the board of health and city commissioners being composed of the same persons. *Ib.* 165.

2. Because the powers and duties of the board of health and city commissioners, being united by the ordinance (*Ib.* 165,) that part of the 13th section, which requires a report in writing from the board of health to the city commissioners, of the existence and nature of the alleged nuisance must be considered as repealed—such a report being absurd and unnecessary.

3. Because the existence and character of the nuisance, being ascertained by the tribunal competent to decide the question, and the plaintiffs having the power to tax as well as pave, by the Act of 1797, ch. 54, in the absence of proof to the contrary, it must be understood to be a lawful exercise of those powers.

4. Because the nature of the nuisance shows that it was for the benefit of those districts that it should be removed; and the competent authorities had decided, that it could only be done by paving.

5. Because the power to prevent and remove nuisances, to pave, and to tax for the said paving, have been properly exercised by the plaintiffs by their officers and servants.

6. Because the nature and character of the alleged nuisances are sufficiently ascertained by the commissioners of health and city commissioners, in the warrants issued by them, and no other ascertainment thereof was necessary.

7. The appellants also contended, that the Court below erred in refusing to grant the prayer of the plaintiffs, contained in the third bill of exceptions; because they offered evidence, proper to go to the jury under the fifth and sixth counts in the declaration, to show the assent of the defendants' intestate to the paving of Barre street, between Charles and Light streets, and of Forrest street, between Lee and York streets, and the payment for the same by the plaintiffs; and that upon such assent the plaintiffs were entitled to re-

there is no community of estate or interest given to his Richard and Augustine, take as tenants in common, but takes in severalty. It is obviously not the intention of the testator to blend that among his sons which he had so given to his five daughters shall take an interest in common with Richard and Augustine, in the lands given to them as tenants in common, but also an interest in common with William in the lands given to him in severalty. And consequently if the daughters were considered as tenants in common, of an estate for life defeasible on marriage as has been contended, they then must each of them be considered as a tenant in common, taking one-seventh of the lands given to Richard and Augustine, and one-sixth of that given to William, and not merely one-eighth of that given to Richard and Augustine, and therefore for this reason alone the interlocutory of the twelfth day of July last, and the proceedings under it, are erroneous and cannot be allowed to stand.

But these five daughters of the testator do not take an estate for life, or any other less estate in common with their brother Richard and Augustine, in the lands in the proceedings in question, **507** * which is susceptible of partition. The difference in the testator's language and consequently in his intention, in his will, in which he provides for his sons and for his daughters, is strong, and clear. To his sons Richard, and Augustine, and his son William he gives an estate in fee of his dwelling place, and a parcel of land, and he then, charges all his real estate with certain uses, for the personal benefit of his sons as long as they continue unmarried. In such case the estate is expressed in terms peculiarly apt, suitable, and proper to be devised (he says) unto my sons Richard and Augustine and to my son William and his heirs forever my last Success." And he then gives and devises to his five daughters, of any kind, not an interest in any portion of his estate during their celibacy, or for any time or upon any condition, but he himself perspicuously expresses it, "I give unto my five daughters, the right, privilege, and liberty of dwelling with, &c. in common with my sons, all my land and tenements, and they shall remain single and unmarried."

The manifest object of the testator was to provide for his five daughters, and for that purpose he has charged his estate so far as was necessary to attain his object, at the dwelling in which he left them, or in any of the lands he gave to each of them, the right, privilege, and liberty of dwelling, or leaving, and returning to as a tenant, proper, at any time during their celibacy. And

which he had thus given them, might be made as comfortable as it had been, or as it was in their power to make it, he gave them the right, privilege and liberty, of using and cultivating all his lands, with themselves and their negroes, and of keeping their negroes, stock, and all their other property thereon, and with them, in common with his sons. It is a devise of a personal right, privilege and liberty, to each one of his daughters; a benefit which each one might take or abandon at pleasure, so long as she remained single. It is not a * devise of any real estate, or of a chattel interest to the daughters, but it is a mere charge for their benefit; **508** upon all the lands of the testator, which is inalienable, and indivisible in its nature. It is a benefit to be taken or relinquished only by the person to whom it is given, and with whose person it is inseparably connected. Each one of the daughters might release her privilege, or as the answer states, might rent her privilege to her brother, or the holder of the land for a certain sum per annum; but neither of them could alien or transfer her privilege to a stranger, and thereby introduce a new and unwelcome inmate into her brother's household. Nor could any one of them use and cultivate the lands, in any other manner than by themselves and their negroes, or put upon their lands, any negroes, stock, or other property, if she herself could reside on no part of the lands, because the testator has declared it should only be "thereon and with them." It is an intangible privilege, extended over the whole of the testator's real estate, vested in each one of his daughters. It cannot be confined to the lands given to Richard and Augustine, or to those given to William, because it has been spread without distinction over them all. Its extent cannot be designated by any metes and bounds, or represented by any number of acres. It is an incorporeal right vested in each one of five persons, in her character of daughter, and because of that character, to dwell in any house, and to put her stock to graze in any pasture upon the whole of the testator's lands. It is therefore a mere charge, and not in any respect such an estate, in the land as is capable of being separated and partitioned off.

These charges are incumbrances upon the testator's real estate, which it appears he contemplated would be lessened, or extinguished by the relinquishment, marriage or death of the five claimants, it seems are now reduced to one only, that is Lydia, the present defendant, who is at this time in the perception and enjoyment of this right, privilege and liberty, which her father gave her, and which this Court has neither the power nor the disposition to diminish, or impair by partition, or in any other manner whatever.

* Decreed, that the bill of complaint be dismissed with costs. **509**

From which appeal the complainant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, and ARCHER, JJ.

A. C. Magruder and Shaw, for the appellant, contended, 1. That the appellee during her single life is entitled to one undivided eighth part of the land devised by her father, or if she is not so entitled, she is entitled to nothing in consequence of the devise to the daughters being unintelligible and therefore void. 2. A devise of the use of land, is equivalent to a devise of the land itself—they cited 3 *Bac. Abrid.* 391; 2 *Blk. Com.* 20.

R. Johnson, for the appellee. The complainant has shown no right to ask for a partition of the lands. He shows no right or interest in himself in the land in question—no exhibits or title papers of any kind are filed, and the answer so far from admitting the title of complainant, affirms that the title is in another person. A party applying for a partition must show a title, *Hopkins vs. Stump*, 1 *Johns. Ch.* 111. If the answer does not deny the allegations in the bill, the complainant should have excepted to it, and he is not now at liberty to assume as true, what is not denied. *Wilkin and others vs. Wilkin*, 2 *H. & J.* 301; *Young vs. Grundy*, 6 *Cranch*, 51.

ARCHER, J. delivered the opinion of the Court. The complainant seeks a partition of the tracts of land described in the bill, alleging a seisin in seven-eighths of said tracts, and that the respondent is in possession of, and exercising acts of ownership over the whole of the lands.

The answer of the respondent states that Augustine Gambrill, the father of the respondent, devised his dwelling plantation to his two sons, Richard and Augustine Gambrill, and to his five daughters; after which she states that by the intermarriage of three of her sisters, and the death of one of them, and by a sale from her brother Richard, to her brother Augustine Gambrill, she considered that she became entitled to one-third *of the land, and her brother

510 Augustine Gambrill, to two-thirds thereof.

The cause is set down for hearing, and an interlocutory decree passes at July Term, 1826, for partition, and commissioners are accordingly appointed to make partition. Upon the return of the commissioners at October Term, 1826, the Chancellor dismissed the complainant's bill, from which decree this appeal has been taken.

We do not feel ourselves called upon to express any opinion on the will of Augustine Gambrill, but shall decide the cause upon the bill and answer.

The bill alleges a seisin of seven undivided eighth parts of this land, and the seisin, should have been proved by the complainant, or admitted by the answer. The complainant relying upon the answer exhibited no proof of seisin, but set the cause down for hearing upon the coming in of the answer.

By a reference to the answer it will be found to contain no admission of any allegation in the complainant's bill, except her possession of the land. Her answer is very defective and inartificial; and it is only indeed by inference that we can arrive at the conclusion, that she is speaking of the lands referred to in the bill, but considering what is only a matter of inference, as certain, and that the lands of which she speaks, are the lands of which the complainant seeks partition, there is not only no admission of right or title in the complainant but an averment of title in herself, and Augustine Gambrill her brother. In this stage of the cause the complainant was called on for proof of his allegations, and exhibiting none, but setting the cause down for hearing, his bill was rightfully dismissed by the Chancellor.

But supposing there is no denial of title in the answer, and that the material allegation in the bill, the seisin of the complainant is unanswered, this is clearly no admission of any unanswered fact. Chancellor HANSON, 2 *H. & J.* 301, says, if any material matter charged in the complainant's bill, has been neither denied nor admitted by the answers, it stands on the hearing of the cause for naught, and in 6 *Cranch*, 51, *Young vs. Grundy*, Ch. J. Marshall, in delivering the opinion of the Court, * says, "that if the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing. Upon a question of dissolution of an injunction, they are to be taken as true." A respondent submitting to answer must answer fully, but if the answer be defective, and insufficient to meet the allegations and interrogatories of the bill, the complainant desiring a fuller response must except to the answer. If he do not he cannot rely on the silence of the respondent in relation to any material allegation, but must prove it.

Decree affirmed.

GOWAN *vs.* SUMWALT.—December, 1829.

It is the common practice, where a purchaser under a decree in Chancery is kept out of possession by the former owner, for the Chancellor to interpose the authority of that Court, and cause the possession to be delivered up. (a)

But where G. purchased property at a sale under a decree, and gave his notes with S. as his surety for the purchase money, which S. was afterwards obliged to pay, and G. then executed a deed of the same property to S. which however was left with I. as an escrow, to be delivered upon a condition that did not appear to have been performed, G. being in possession, could not be ousted by the authority of the Court of Chancery;

(a) See *Tongue vs. Morton*, 6 *H. & J.* 22, note; *Frazer vs. Palmer*, 2 *H. & G.* 347.

and even if a mortgage had been executed by him to secure S. the proceedings in Chancery should be of a different character. (b)

APPEAL from the Court of Chancery. The proceedings which took place on the petition which was filed in this case by the appellee, Frederick Sumwalt, on the 12th of April, 1826, are sufficiently set forth in the opinion delivered by this Court.

BLAND, C. (March Term, 1827.) This matter standing ready for hearing, and the solicitors of the parties having been heard, the proceedings were read and considered. The only question is whether in point of fact Sumwalt was with the consent of Gowan to take his place, and be considered as the purchaser from the trustees. I am satisfied from the proofs that Gowan did agree, that Sumwalt should be deemed the * purchaser; and having thus failed to shew
512 sufficient cause as required by the order of the 13th of April, 1826, it is therefore ordered that an injunction issue, commanding the said Gowan to deliver possession of the property in the proceedings mentioned, to the said Sumwalt, returnable forthwith. From this order the defendant appealed to the Court of Appeals.

The cause was argued before BUCHANAN, C. J., EARLE, MARTIN, STEPHEN, ARCHER and DORSEY, JJ.

Flusser, for the appellant, cited 4 *Com. Dig.* 473, (*Am. Ed.*) 274, (*note r*;) *Rob. on Frauds*, 108; *Sugd.* 68; *Newl. Pr.* 339, 142, 150; *Sugd.* 40.

Winchester, for the appellee, contended, that Gowan's rights were not affected by the decision of the Chancellor; and that an appeal would not lie from an order to deliver possession.

BUCHANAN, C. J. delivered the opinion of the Court. The substance of this case as it is presented to us by the proceedings, appears to be this. A decree in Chancery being passed, and trustees appointed for the sale of a certain lot or parcel of ground in the City of Baltimore; the premises were sold at public sale by the trustees, and purchased by Gowan, the appellant, who passed his notes for the purchase money, with Sumwalt the appellee, and another, as his sureties. The sale was regularly reported by the trustees, and ratified and confirmed by the Chancellor; and the purchase money not being paid, suits were brought, and judgments obtained against the purchaser, Gowan, and his securities. Sumwalt discharged the judgments obtained for the purchase money, and the trustees and Gowan united in an instrument of writing, purporting to be a deed to Sumwalt for the premises, which had been before sold to Gowan. Gowan continuing in possession, Sumwalt preferred a petition to the Chan-

(b) Cited in *Nutwell vs. Nutwell*, 47 Md. 45.

cellor, alleging that he had been substituted as the purchaser, and that a deed for the premises had been made to him by Gowan and the trustees, and praying an order to compel Gowan to deliver up the possession. Gowan * in his answer positively denies that it ever was agreed or understood, that Sumwalt should be substituted in his stead as the purchaser, or that he ever was so substituted; and states that it was agreed between them, that Sumwalt should take a deed of conveyance of the premises from the trustees, and execute a bond to reconvey to him, on being reimbursed the amount of the purchase money by a stipulated time; and alleges that when the deed was executed, it was left by him in the hands of a third person to be delivered to Sumwalt, on his executing and delivering a bond to reconvey the property to him, on the terms before agreed upon, and not otherwise; but that Sumwalt afterwards by fraud and artifice obtained possession of the deed, and then refused to execute a bond of conveyance, and expressed his determination to hold the property. Upon the proof taken in the cause the Chancellor was of opinion, that Gowan did consent to Sumwalt's being substituted in his stead, as the purchaser, and passed an order for an injunction commanding him to deliver possession; from which order the case is brought by appeal before this Court. It is the common practice where a purchaser under a decree in Chancery is kept out of possession by the former owner, for the Chancellor to interpose the authority of that Court, and cause the possession to be delivered up. But that does not seem to us to be the character of this case. It is the case of one, who not being the purchaser himself, seeks to obtain the possession of the premises, by proceedings against him who was in fact the purchaser. How far this would be a fit case for this summary mode of proceeding, if it could be shown that Gowan did agree to permit Sumwalt to be substituted as the purchaser is not a question before us; there being nothing in the evidence in our opinion to establish that fact. The proof by Mr. Moale (one of the trustees) who prepared the deed is, that Gowan consented that the property should be conveyed by the trustees to Sumwalt, but insisted on being permitted to redeem it, by paying the amount of the judgments, and that Sumwalt agreed to allow him sixty days, and promised to reconvey him the property if he paid him the money, at the expiration of that time. That Gowan repeatedly said Sumwalt * was ungenerous; that sixty days was not enough, and that he ought to allow him a longer time. Mr. Harris one of the justices who took the acknowledgment, proves that there was some hesitation on the part of Gowan about signing the deed, the particulars of which he does not recollect, but that he finally signed it, with the understanding, that it was not to go out of the possession of Mr. Israel. Another witness swears that Sumwalt told him he never wanted the property for his own use, and was willing to give the time craved by Gowan for the payment of the money, which he

said was sixty days. And Mr. Israel, the other magistrate who took the acknowledgment, proves that when the deed was presented to Gowan for signature, he hesitated about signing it, saying there was an understanding between himself and Sumwalt relative to the property which ought to be reduced to writing, and stated in the presence of Sumwalt, something not recollected by the witness, about a right to be reserved to him to have a reconveyance of the property, on his paying the purchase money, to which Sumwalt assented. That he the witness then proposed, that the deed should be executed, and left with him, until matters were satisfactorily arranged, to which Gowan agreed. That the deed was accordingly executed and left with him. That Sumwalt called for it once or twice in the course of a day or two afterwards, and that he refused to deliver it to him; but finally delivered it to Mr. Moale, who said he would see the matter arranged between the parties. There does not appear to us to be any thing in the whole of this testimony, tending to prove that Gowan ever agreed or intended that Sumwalt should be substituted in his room as the purchaser, or that it was so understood by Sumwalt himself, and all the evidence shows that the deed was not delivered by Gowan to Sumwalt as his deed, but was left with Israel, as an escrow, to be delivered on a condition that does not appear to have been ever performed. It is not therefore, and cannot be taken as the deed of Gowan, and consequently is no evidence of any assent on the part of Gowan to Sumwalt being taken as the purchaser. And all that can be collected from the parol evidence is, the intention of the * parties, that the property should be conveyed to Sumwalt, as a pledge only to secure the re-payment of the purchase money, and not that he should be substituted, as the purchaser, which intention was never carried into effect. And if it was; if a mortgage had been regularly executed, and delivered, the proceedings in Chancery on the failure, by Gowan to repay the amount of the purchase money, should have been of a different character.

Decree reversed.

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ACCOUNT.

• See EQUITY, 26.

ACTION.

1. The value of property delivered by an administrator to a distributee, as payment of his portion of a deceased's estate, cannot be recovered back in a Court of law, in consequence of such administrator being afterwards compelled by a recovery at law, to pay a debt due by the deceased, of which he was not aware when he distributed the estate; or his having in part paid the debts of the deceased, out of his own private funds. The remedy for such claims is in a Court of equity. *Turner vs. Egerton*, 280.
2. It is not universally true, that where one is benefited by the payment of money by another, the law raises an assumpsit against the party benefited, in favor of the party paying the money. A stranger cannot at his pleasure make me his debtor, whether I will or not, by paying a debt due from me to another. *Ib.*
3. Where one is compelled to pay the debt of another, he may recover against him in an action for money paid, upon the promise which the law implies, as in the case of money paid by a surety in a bond, which is considered as paid to the use of the principal, and may be recovered in an action against him for money paid. *Ib.*
4. An action at law cannot be maintained to recover back a payment in money, made by an administrator to the guardian of a distributee of his intestate. The remedy is in equity. *Turner vs. Egerton*, 284.

See BOND, 1, 3.

EXECUTORS, 4.

PLEADING, 1, 3, 4.

PROMISSORY NOTES, 7.

APPEAL AND ERROR.

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ASSUMPSIT,

1. The action for money paid, laid out, and expended, must be founded upon a contract, express or implied. *Mayor, &c. of Balto vs. Hughes*, 265.
2. No person can by a voluntary payment of the debt of another, without his authority, make himself a creditor of the person whose debt is thus paid. *Ib.*
3. If one is compelled, or is in a situation to be compelled to pay the debt of another, as in the case of a surety and does pay it, the law implies a promise on the part of him for whom the money is paid,

ASSUMPSIT.—*Continued.*

on which an action may be sustained, for in such case it is voluntary, but a compulsory payment. *Ib.*

4. A tax imposed by a municipal corporation cannot be recovered for money paid, laid out, and expended, although such corporation has paid the cost of the improvement for which the tax was created. *Ib.*
5. Nor can the cost of such improvement, or any part thereof, be recovered from a defendant, liable to pay tax therefor on a contract for work and labor, where the ordinance under which the work was done, has not been properly pursued, so as to create a legal liability in the defendant. *Ib.*

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See BOND, 1, 3.

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See PROMISSORY NOTES, 1, 2, 7.

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See EQUITY, 39, 40, 41, 42, 43, 44.

BOND.

1. Where an applicant for a discharge under the Acts relating to insolvent debtors, fails to appear according to the condition of the bond taken from him, an action in the name of the State, (the obligee) for the use of a creditor, may be maintained thereon, against the applicant's security in the bond. The pleadings must disclose, that the equitable plaintiff was a creditor of the insolvent, to a certain amount; and the applicant's failure to appear. The amount of the creditor's debt, is the measure of damages; and neither the poverty of the applicant, nor the fact, that no allegations were filed against him by creditors; constitutes a defence thereto. *Kiersted vs. State*, 101.
2. Obligations in which many persons are interested, may be taken in the name of the State, whenever the law is silent in naming the obligees, to whom they are to be given. *Ib.*
3. So bonds with condition for the appearance of insolvent debtors, made to the State as obligee, are sanctioned by the uniform practice of twenty years, although the Acts of Assembly, under which they are required to be executed, contain no specific provision for making them to the State, and creditors may bring suits on them, for their use, though not expressly authorized by law to sue. *Ib.*
4. The bond of a trustee appointed by the Chancellor to sell the real estate of a deceased person, for the payment of his debts, is not liable to be put in suit, after the trustee had sold the deceased's property, and received the money therefor, upon the order of the

BOND.—Continued.

Chancellor distributing such proceeds among the creditors, without notice to the trustee of such distribution. *State vs. Annan*, 245.

See EVIDENCE, 3.

EXECUTORS AND ADMINISTRATORS, 3.

CONSTITUTIONAL LAW.

1. The Constitution of this State composed of the Declaration of Rights, and form of Government, is the immediate work of the people in their sovereign capacity, and contains standing evidences of their permanent will. It portions out supreme power, and assigns it to different departments, prescribing to each the authority it may exercise, and specifying that, from the exercise of which it must abstain. *Crane vs. Meginnis*, 252.
2. The public functionaries move in a subordinate character, and must conform to the fundamental laws or prescripts of the creating power. When they transcend defined limits their acts are unauthorized, and being without warrant, are necessarily to be viewed as nullities. *Ib.*
3. The legislative department is nearest to the source of power, and is manifestly the predominant branch of the government. Its authority is extensive and complex, and being less susceptible on that account of limitation, is more liable to be exceeded in practice. *Ib.*
4. Its acts out of the limit of authority assuming the garb of law, will be pronounced nullities by the Courts of justice; it being their province to decide upon the law arising in questions judicially before them, and upon the Constitution as the paramount law. *Ib.*
5. The check to legislative encroachments is to be found in the Declaration, that the legislative, executive and judicial powers, ought to be kept separate and distinct; and the solemn obligations of fidelity to the Constitution under which all legislative functions are performed. *Ib.*

See DIVORCE, 1.

CONTRACT.

See DAMAGES, 1.

EQUITY, 7, 30, 32, 34.

COVENANT.

See DAMAGES, 1, 2.

DAMAGES.

1. In an action upon agreement, by which, after reciting that D. had sold to W. tracts or parcels of land, sold by A. to C. and R. and by their agents sold to D. and for which D. had executed a deed to W.; D. covenanted with W. that a deed should be executed to him, conveying to him the said lands of C. and R. by a given day, and to that, bound himself in a certain penalty;—such penalty cannot be recovered as liquidated damages, it was only intended by the parties as a security for the faithful performance of the contract. *Dyer vs. Dorsey*, 238.
2. In this case, the sum of money which it might be necessary to pay, for obtaining the title of C. and R. would furnish the true measure of damages, for a breach of D's covenant, the proof of which sum

DAMAGES.—Continued.

was on the plaintiff; and it appearing that the plaintiff had
D. the whole of the purchase money for the said lands, th
were properly instructed that in estimating the amount of da
they should, under the Act of 1785, ch. 46, sec. 7, deduct wi
sum of money remained in the hands of the plaintiff on acco
said purchase. *Ib.*

See BOND, 1.

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DESCENT AND DISTRIBUTION.

See EXECUTORS AND ADMINISTRATORS, 6.

DISTRESS.

See LANDLORD AND TENANT.

DIVORCE.

1. Divorces in this State from the earliest times have emanated from the General Assembly, and can now be viewed in no other light, than as regular exertions of legislative power. *Crane vs. Meginnis*, 252.
2. The suit for alimony in this State is a distinct remedy from the proceedings to obtain a divorce, and for a series of years the wife's maintenance has been recoverable through the intervention of our judicial tribunals. *Ib.*
3. A divorced wife may recover. (having merits) a maintenance suitable to her station in life, and to quadrate with the situation of her husband, by a bill in Chancery. *Ib.*

EJECTMENT.

1. It is true as a general principle, that the lines of a tract of land originally run by course and distance, without calls, must be confined to the course and distance, and cannot be extended beyond them. *Giraud vs. Hughes*, 115.
2. Where a tract of land lies adjacent or contiguous to a navigable river, or water, any increase of the soil, formed by the water gradually, or imperceptibly receding, or any gain by alluvion in the same manner, shall, as a compensation for what it may lose in other respects, belong to the proprietor of the adjacent or contiguous land. It is not upon the principle that the land calls for the water, but, because it adjoins the principle that the land calls for the water, the soil so formed. *Ib.*
3. In ejectment it appeared that the land for which the action was brought, and which had been recently patented as vacant land, had been formed by the gradual recess of the waters on the shores of the River Patapsco; and that another tract of land the lines of which ran into, though they did not call for the water, where the recess-

EJECTMENT.—Continued.

sion took place, had been patented many years before. The defendant claiming title under the grant of this last tract, *held*, that the action could not be sustained. *Ib.*

See EXPROUCTION, 1.

ENGLISH DECISIONS.

English decisions made since the Revolution, have no authoritative force here. *Bowie vs. Duvall*, 59.

EQUITY.

1. Where it was held that an order of County Commissioners directing and authorizing an old road to be shut up, placed the premises over which it formerly ran under the control of the defendant, and gave him the same right of user of the land of that road, that he had of the rest of his estate; and that certain subsequent orders of the Court of Chancery, so affected his rights and interest therein, as to form a fit subject of appeal. *Williamson vs. Carnan*, 67.
2. Where the Chancellor entertains a doubt as to the propriety of granting an injunction at all, or where, when granted, it operates in restraint of public commissioners for the opening a road, street, or the like; or it altogether stops, retards, or embarrasses the operation of a large manufacturing establishment, or restrains a public ferry, in these and some other cases of a very peculiar nature, it has been the practice in the first instance, or on application, to appoint a very early day for the hearing of the motion of a dissolution of the injunction, and that too, either with or without answer. Per BLAND, Chan. *Ib.*
3. But where upon a defendant's own showing, the injunction operates in restraint of a right, which he has but recently acquired, or has not long decidedly and exclusively enjoyed, and there is nothing peculiar in the case, so as to require a departure from the general rule, it must, as in other cases where individuals only are restrained, take the course of the Court. *Ib.*
4. Whether an inferior tribunal with jurisdiction over a given subject, has proceeded to exercise it upon such subject correctly, or erroneously, or has in any respect neglected, or disregarded, its prescribed modes and forms, is not for the Chancellor to determine, where he has no revising or superintending authority over it. *Ib.*
5. Chancery will restrain a party from doing an act injurious to an individual, or which may be prejudicial as a public nuisance; pending any judicial proceedings before those tribunals, by which the authority to do the act, or its lawfulness is to be determined. *Ib.*
6. Where the facts charged in a bill were all admitted to be true by the pleadings, and there was no replication, but the parties agreed that the Chancellor might take the papers and decide the cause; by such agreement the cause is set down for hearing, and whether the proceedings of the defendant be regarded as a plea, or as an answer, the question submitted, is on their legal sufficiency to bar the plaintiff's claim. *Tiernan vs. Poor*, 91.
7. When any instrument of writing is designed to operate as a transfer of property, and proper and apt terms are used, whereby the meaning of the parties can be clearly ascertained, if some circumstances

EQUITY.—Continued.

are omitted to give it legal validity, which deprive it of its intended specific operation a Court of equity will set it up as a contract as evidence of a contract; and when the rights of innocent parties would not thereby be affected, will, as between the parties to such instrument, carry it into specific execution; provided it is founded upon a valuable consideration. *Ib.*

8. Where a deed by husband and wife of certain property which has been conveyed to trustees for the sole use of the wife, was in usual form of a mortgage, except that the wife was not examined apart from her husband, by the Justice of the Peace who took acknowledgment, and according to the Acts of Assembly passed in relation to deeds executed by *femes covert* grantors. Upon a bill filed by the grantee in said deed, praying a sale of the mortgaged premises, the Court held, that whether the instrument of writing which forms the basis of this call, for the interposition of a Court of equity, be in fact a mortgage, in its legal and technical sense, in consequence of its not having been acknowledged in the manner which the Acts of Assembly require, it was not necessary to determine; but it was clearly intended to be a mortgage, and within the limits of the wife's disposing power; and therefore decreed the property mentioned therein to be sold. *Ib.*
9. The title to the assistance of a Court must be exposed by the pleadings; but the style and character of pleading in equity, has always been of a more liberal cast, than that of other Courts; as mispleading in matter of form there, has never been held to prejudice a party, provided the case made is right in substance, and supported by proper evidence. *Ib.*
10. Where it was held, that a certain order passed by the Chancellor did not so settle, or materially affect, all, or any of the rights, or interests in controversy, as to make it a decretal order, from which an appeal would lie;—that it was a mere preparative, to the decision of the cause, and not decretal; and that it was only from what the Chancellor had done, that is, adjudged, or decreed, and not from what he intends to do, that an appeal would lie. *Hagthorp vs. Hook*, 29.
11. A. by deed, conveyed certain real and personal chattels to I. upon the proviso, that if I. his executors, &c. should absolutely omit, neglect and refuse to pay certain creditors of A. recited in the deed, their just demands, then the deed should be void. This property came to the hands of I. and after his death, passed to his administrators and the other defendants claiming under him, and them. The Chancellor decreed that the deed would be considered a mortgage, and nothing having occurred to destroy its redeemable quality—but one of A's creditors having been paid, directed the auditor to state an account, in which I's representatives must be charged with the value of the whole of the personal chattels, and interest thereon, from the date of the deed from A. to I.; and with the rents and profits of the real chattels from the same date, and until the time when they passed into the hands of the other defendants; who were responsible during the time they respectively had possession. And that I's representatives would be held

EQUITY.—*Continued.*

- liable for all rents, and profits, which the other defendants should fail, or be unable to pay, giving them credit for the debt paid. *Per BLAND, Chan. Ib.*
12. When the general replication is put in, and the parties proceed to a hearing, all the allegations of the answers which are responsive to the bill, shall be taken for true, unless they are disproved by two witnesses, or by one witness with pregnant circumstances. *Ib.*
 13. Every allegation of the answer which is not directly responsive to the bill, but sets forth matter in avoidance, or in bar of the plaintiff's claim, is denied by the general replication, and must be fully proved or it will have no effect. *Ib.*
 14. If a defendant submit to answer at all, he must answer fully, and particularly, not merely limiting his responses to the interrogatories of the bill; but respond to the whole and every substantial part of the plaintiff's case; he is not however bound to go further and to answer interrogatories asking a disclosure of matter, no way connected with, or material to the case. *Ib.*
 15. When the answer in the body of it, purports to be an answer to the whole bill, but the respondent declares, that he is entirely ignorant of the matters contained in the bill, and leaves the plaintiff to make out the best case he can, or uses language to that effect; and the plaintiff files the general replication, all the allegations of the bill are thus denied, and put in issue; and consequently all of them must be proved at the hearing. *Ib.*
 16. The rule in relation to trusts by implication, or operation of law, is by no means so large, as to extend to every mere voluntary conveyance. *Ib.*
 17. Where the nature of the transaction charged in the bill, is such a one as must have been altogether within the knowledge of the intestate, the administrator may answer as he is informed and verily believes, but the answer of an administrator must always be taken, as well with a reference to the reason given for his belief, as to the nature of the subject of which he speaks. *Ib.*
 18. A purchaser for a valuable consideration without notice will not be disturbed in equity. *Ib.*
 19. A purchaser with a knowledge of the trust becomes himself the trustee, and stands in the place of the vendor, under whom he claims. *Ib.*
 20. A purchaser with notice, from another purchaser without notice, may protect himself by the want of notice in his vendor. *Ib.*
 21. When a purchaser cannot make title, but by a deed which leads him to a knowledge of the fact; and more especially, when the deed by virtue of which he takes, recites or directly refers to the instrument, in which the trust is declared, or from which it arises, he shall be deemed cognizant of the fact, and a purchaser with notice. *Ib.*
 22. Under the head of just allowances, it has long been the course of this Court, to allow a trustee or mortgagor in possession, for all necessary expenses incurred for the defence, relief, protection and repairs of the estate. *Ib.*
 23. And when a mortgagor thinking himself absolutely entitled, had expended considerable sums in repairs and lasting improvements, he should be allowed the value of them. *Ib.*

EQUITY.—*Continued.*

24. The estimate of the value of such lasting improvements, is to be taken as they are, at the time of accounting, or passing the final decree: and in charging rents and profits the estimate must not include those arising exclusively from such improvements. *Ib.*
25. Where it was *held*, that an appeal did not lie from an order of the Chancellor overruling a plea, which decided a mere question of pleading, and settled no right between the parties, and that the plea was void for uncertainty. *Danels vs. Taggart*, 160.
26. Where it was *held*, that the plea of an account stated to a certain bill in Chancery could not be sustained, unless it be supported by answer, denying the receipt of any part of the money, for which the defendant is called upon to account, subsequently to the time when the account stated, was adjusted. *Ib.*
27. By taking issue on a plea in equity, the plaintiff admits its sufficiency as a bar, if the facts which it asserts are established by proof; and if on such an issue, the matter of the plea is proved, the bar is complete, and the bill must be dismissed. *Ib.*
28. Upon a merely equitable estate, no writ of partition can be maintained at law. *Coale vs. Barney*, 171.
29. A failure to comply with an engagement to do a mere nugatory act, ought not to impair the rights of a complainant in equity to relief, when the facts of his case, otherwise concur, to sustain his bill. *Ib.*
30. Where it was *held*, that there was an adequate consideration to support a certain agreement, for the violation of which damages to the full extent of the injury sustained, might be recovered; that the complainants had not slept upon their rights in such a way, as to shew the contract had been abandoned; that Chancery has power to grant adequate relief, which could only be done by providing the means, necessary to carry into effect the leading object of the parties, (the leasing certain property at reasonable rents;) and that in doing this, it was the duty of the Court, to gratify the minor provisions of the agreement, so far as it could be done consistently, with the accomplishment of the grand design. *Ib.*
31. The defendant, in this case, was deemed to have forfeited the right of fixing the reasonableness of the rents, to be reserved in certain leases referred to in the preceding contract, by shewing her determination to act in such a way, as to render her exercise of that right wholly inconsistent with the relief due to the complainants, and her right was therefore transferred to a trustee appointed for the purpose of executing the agreement; which trustee was enjoined to execute leases, for such rents, as he, together with the complainants, should think reasonable. *Ib.*
32. Where an agreement contains provisions, which, by reason of some technical principle of law, cannot be carried into effect, according to its literal import, it is the duty of a Court of equity, for the sake of the intent, to give it that construction which the rules of law will tolerate; and the intention of the parties, to be collected from the whole instrument, will justify. *Ib.*
33. So the interests of the *cestuis que trust*, in remainder, in the property referred to in the preceding agreement being real, and not personal estate, and as such, could not be limited to their executors and ad-

EQUITY.—*Continued.*

ministrators. The Court decreed the rent to be paid to the *c. q. t.* and their heirs, and this as to all the parties entitled to such rents. *Ib.*

34. The rule, that a Court of equity will sometimes adopt a more liberal and enlarged construction than prevails at law, can never be tolerated, unless it be necessary to effectuate the motives which induced a contract. *Union Bank vs. Edwards*, 183.
35. Relief, by the doctrine of substitution, is never extended to a security, but upon the assumption that the creditor's debt has been, or is to be fully paid—that his further detention of the mortgaged property, is against equity and good conscience. *Ib.*
36. So where a mortgage was executed, for the purpose of securing the payment of all and every sum or sums of money, then owing, or which might thereafter be due and owing, from the mortgagor to the mortgagee, upon any promissory note, or notes negotiated or to be negotiated with the mortgagee, of which the mortgagor might be drawer, or endorser, or otherwise however, and upon sale of the mortgaged premises, the proceeds being insufficient to pay a note of the mortgagor's to the mortgagee, for which the latter had no other security than the mortgage; it was *held*, that an accommodation endorser on a note of the mortgagors, discounted by the mortgagee after the execution of the mortgage and before the sale, could not call upon a Court of equity to distribute the fund above mentioned, rateably, in payment of both notes. *Ib.*
37. A complainant filed an exception to an answer, and the County Court without deciding upon it, referred the case to the auditor, who stated an account, rejecting a credit claimed by the defendant's answer; to this, exceptions were also filed, and overruled, and the account ratified. Upon appeal, it was *held*, that the County Court had acted prematurely, that after the exceptions to the answer had been decided on, the case should have been set down for argument on bill and answer, or a replication to the answer put in, and an opportunity afforded to the respondent, to make out his defence, by proof. *Egerton vs. Reilly*, 207.
38. Where it was *held*, not to be consistent with the salutary exercise of that sound discretion which the Court of Chancery possesses, to open or discharge the enrollment, and vacate a certain decree for the purpose of enabling the defendant to make his defence. *Burch vs. Scott*, 212.
39. A bill of review will only lie for errors apparent on the face of the decree, or for some new matter discovered since the making of the decree. *Ib.*
40. A bill of review for errors apparent must be for error appearing in the body of the decree itself. *Ib.*
41. A bill of review cannot be brought without having the leave of the Court, in some shape. If it be for matter apparent in the body of the decree, then, upon the plea and demurrer of the defendant to the bill, the Court judges whether there are any grounds for opening the enrollment. If it be for matter come to the plaintiff's knowledge after the making of the decree, then, upon a petition for

EQUITY.—Continued.

- leave to bring a bill of review the Court will judge if there be any foundation for such leave. *Ib.*
42. Upon a bill of review for error apparent there is no distinction between an answer and a demurrer. *Ib.*
43. A bill of review cannot be supported on the ground of new matter, discovered since the decree, unless such new matter go to prove what was before in issue, and unless the leave of the Court be first obtained, which will not be granted without an affidavit that the new matter could not be produced by the party claiming the benefit of it at the time when the decree was made. *Ib.*
44. A supplemental bill in the nature of a bill of review does not lie after a decree has been enrolled. *Ib.*
45. A decree is to be considered as enrolled when it is signed by the Chancellor and filed by the register, and the term has elapsed during which it was made. It cannot then, as a general rule, be vacated on petition. *Ib.*
46. It is within the discretion of the Court to discharge the enrollment and vacate the decree for the purpose of enabling the defendant to make his defence. *Ib.*
47. To obtain a partition of land in equity, the complainant must allege and establish a seisin in himself. *Warfield vs. Gambrill*, 288.
48. To a bill praying for a partition of lands, alleging a seisin in the complainant with others, the defendant in his answer did not respond to the averment of seisin; the cause being set down for hearing upon bill and answer, the silence of the defendant is no admission of that fact, and the complainant having taken no proof of it, his bill was dismissed. *Ib.*
49. A respondent submitting to answer must answer fully, but if the answer be defective and insufficient to meet the allegations and interrogatories of the bill, the complainant desiring a fuller response must except to the answer; if he do not, he cannot rely upon the silence of the respondent, in relation to any material allegation, but must prove it. *Ib.*
50. It is the common practice, where a purchaser under a decree in Chancery is kept out of possession by the former owner, for the Chancellor to interpose the authority of that Court, and cause the possession to be delivered up. *Gowan vs. Sumwalt*, 289.
51. But where G. purchased property at a sale under a decree, and gave his notes with S. as his surety for the purchase money, which S. was afterwards obliged to pay, and G. then executed a deed of the same property to S. which however was left with I. as an escrow, to be delivered upon a condition that did not appear to have been performed. G. being in possession, could not be ousted by the authority of the Court of Chancery; and even if a mortgage had been executed by him to secure S., the proceedings in Chancery should be of a different character. *Ib.*

See ACTION, 1. 4.

DIVORCE, 3.

EXECUTORS AND ADMINISTRATORS, 2.

TAX, 2.

WILLS.

ESCROW.

See EQUITY, 51.

EVIDENCE.

1. No person who is called as a witness, not being a party to the suit, can refuse to give testimony on the ground, that he may thereby become liable to a civil action not of a penal nature, or sustain pecuniary loss, or that the verdict may be used as evidence against him in some other civil proceeding then pending, or which may thereafter be instituted. *Hays vs. Richardson*, 195.
2. A witness on the *voir dire*, may by the party objecting to his examination-in-chief, for the purpose of shewing his interest, be called on to state the contents of written instruments, which are not produced; and the reason assigned is, that the party objecting, could not know previously, that the witness would be called, and consequently, might not be prepared with the best evidence to establish his objection. *Ib.*
3. In an action upon a bond, with condition that the obligor, the defendant, should exhibit all the papers concerning and touching the estate of the late W. deceased, to B. mutually appointed by the obligor and obligee to settle said estate, issue was joined upon a replication, which assigned as a breach, the failure to exhibit such papers. *Held*, that it was competent for the plaintiff to offer in evidence, an inventory of W's personal estate, returned by the defendant as his administrator to the Orphans' Court, it being a paper concerning the estate of W. necessary to its settlement, one which by the condition of the defendant's bond, should have been exhibited to B. and proper to enable the jury to ascertain the amount of damages to be awarded to the plaintiff. *Halkerstone vs. Hawkins*, 235.
4. It is not competent to prove by oral testimony, the existence of facts to be ascertained by public commissioners, preparatory to laying a tax, which such commissioners are required to certify in writing. *Mayor, &c. of Balto. vs. Hughes*, 265.

See EQUITY, 12, 13, 15, 48, 49.

FREIGHT, 1.

EXECUTION.

1. A return by the sheriff to a writ of *fieri facias*, that he had levied upon "part of a tract of land called B. supposed to contain, &c." is not sufficient, would be quashed on motion, and unavailable in ejectment to prove title in a purchaser. *Clarke vs. Belmear*, 240.
2. A purchaser at a sheriff's sale is entitled to the benefit of that officer's return, both to the *fieri facias*, and *venditioni exponas*; and when the description of the subject levied on, according to the schedule returned under the first writ, is defective, it may be amended and rendered certain, by the return of the sheriff's proceedings, under the second writ. *Ib.*
3. So a levy under a *fieri facias* which is defective in the description of the property levied on, may be amended by the sheriff's return of the property sold under such writ, the return of the sale describing the property with sufficient certainty. *Ib.*

EXECUTION.—*Continued.*

4. A purchaser under a judicial sale has a right to resort to the judicial proceedings, under which his title accrued, to ascertain *Ib.*
5. The right of a party to obtain a writ of *habere facias possessionem* under the Act of 1825, ch. 103, does not relate to the time the writ was issued, but to the time when the lands were sold. *Ib.*

EXECUTORS AND ADMINISTRATORS.

1. According to the law of England, an administrator *de bonis non* does not call the representatives of the previous deceased administrator of his intestate to account, for any property of the intestate such predecessor may have converted or wasted; nor can he convert or recover any thing, but those goods, chattels and credits of the intestate which remain in specie, and are capable of being clearly and distinctly designated and distinguished as the property of the intestate. *Hagthorp vs. Hook*, 129.
2. In equity, an executor or administrator, is considered as a trustee of the creditors, legatees and next of kin of the deceased; is expected and required to preserve the property of the deceased apart from his own; and if he does so, the Court will do every thing that can be done to protect and assist him. *Ib.*
3. The only remedy at present against an administrator or his representatives, for any waste or misapplication of the effects of the deceased is by an action at law upon his administration bond, by any one interested. *Ib.*
4. The authority conferred by letters of administration *de bonis non* by our law, is to administer all things described in the Act of Assembly as assets, not converted into money, and not distributed, delivered, or retained by the former executor or administrator, under the direction of the Orphans' Court; and such an administrator can only sue for those goods, chattels and credits, which his letters authorize him to administer. *Ib.*
5. The legal title to the chattels real, and personal estate, of an intestate, vests in his administrator, who alone is considered as to them his legal representative; between the death, and the granting of letters, that title is suspended and vested in no one. *Ib.*
6. In the construction of the Statute of Distributions, it has been held, that although the creditors of the deceased are the first and special objects of its regard; yet that the next of kin, among whom the surplus is to be distributed take an interest which vests in them, by operation of law immediately, in the nature of a present debt of an unascertained amount payable at a future day; and it is clear that they can only obtain possession of their distributive share, through and from the administrator. *Ib.*

See ACTION, 1, 4.

EQUITY, 17.

NEGROES AND SLAVES, 2.

FREIGHT.

1. Where it was held, in an action of assumpsit brought to recover a sum of money retained by the owners of a certain vessel on account of freight alleged to have been earned on a voyage to Europe, that cer-

FREIGHT.—*Continued.*

- tain testimony offered by the plaintiff to establish that certain ports in Europe were open to American vessels, was inadmissible and irrelevant. *Wirgman vs. Mactier*, 42.
2. Whether ship owners are entitled in equity and good conscience, to retain money received on account of freight, is clearly a question not to be left to the jury; but proper only to be decided by the Court, under the circumstances of each case. *Ib.*
 3. Where in an action of assumpsit brought by the owner of merchandise shipped in the defendant's vessel, to recover a sum which the defendant had received and retained for freight, it was *held*, that he was not entitled to retain it. *Ib.*
 4. Where by the municipal regulations of certain ports, a certificate of origin was necessary to the admission of certain merchandise there, a ship-master having received such goods on board his ship, and signed a bill of lading for their delivery at one of such ports, cannot in the absence of evidence to shew it was the duty of the shipper to furnish such a certificate, set up the fact of that document not being on board his ship, as an excuse for not entering the port at which he had agreed to land the property entrusted to him; nor as a justification for his delivering it at another port, and thereby earn freight. *Ib.*

GUARANTY.

See PROMISSORY NOTES, 6.

HUSBAND AND WIFE.

See EQUITY, 8.

LANDLORD AND TENANT.

1. G. a *feme sole*, contracted with the plaintiff to let him sow a field in grain, and he agreed to give her one-third of all the grain raised, as rent. The plaintiff went upon and sowed the field in rye. The defendant, who after the making the contract, intermarried with G. entered upon the field, refused the plaintiff permission to cut the crop, and afterwards cut it himself and carried it away. In an action of trover for the value of the rye, it was held that the contract between G. and the plaintiff, clearly constituted them landlady and tenant; and that the plaintiff was entitled to recover. *Hoskins vs. Rhodes*, 127.
2. The reservation of rent *eo nomine* necessarily constitutes a lease. *Ib.*
See REPLEVIN.

LAW AND FACT.

It is the unquestionable and exclusive right of the jury to decide on facts, of the existence of which, contradictory testimony is adduced.
Pawson vs. Donnell, 1.

See FREIGHT, 2.

MORTGAGE.

See EQUITY, 8, 11, 22, 23, 35, 36.

MUNICIPAL CORPORATIONS.

1. Under the 2d sec. of the Act of 1797, ch. 54, the power given to the Mayor and City Council of Baltimore, "to tax any particular part or district of the city, for paving the streets, lanes or alleys therein,

MUNICIPAL CORPORATIONS.—*Continued*,

or for sinking wells or erecting pumps, which may appear for the benefit of such particular part or district," is not confined to any particular description of benefit—such as the ordinary benefit and advantage of paved streets. The preservation of the health of such particular part of the city, is a benefit within the meaning and scope of the Act. *Mayor, &c. of Balto. vs. Hughes*, 265.

2. The legality of laying such tax, does not depend upon whether the paving does, or does not in fact, benefit the particular district taxed, but upon the object, the motive of the corporation in causing the paving to be done. *Ib.*
3. In an ordinance providing for such paving, and the imposition of such a special tax, it is not necessary that it should be expressly stated to be for the benefit of the particular district; if nothing appears to the contrary, such an exercise of the special taxing power will be taken to have been in pursuance of the authority given by the charter. *Ib.*
4. But where an ordinance provides for the paving of a street, &c. in a particular district, and the imposition of a special tax for that purpose on such district, which paving appears from the ordinance to be for the general benefit of the city, and not for the benefit of the particular district, it is not in pursuance of the authority conferred by the charter, and is void. *Ib.*
5. So upon the construction of the 13th sec. of the Ordinance of the 9th March, 1807, which declares "that if the Commissioners of Health shall, at any time report in writing to the City Commissioners, that a nuisance exists in any street, lane, or alley in the City of Baltimore, which will endanger the health thereof," &c. it was held that the word thereof does not relate to the City of Baltimore, so as to make it mean a nuisance which will endanger the city, but that it relates to any street, lane or alley, &c. and means a nuisance that will endanger the health of such street, &c. and the ordinance is clearly within the power conferred by the charter. *Ib.*
6. A corporation must act within the limits of its delegated authority, and cannot go beyond it, yet it ought not by construction to be made to mean what is not clearly expressed, but when its ordinances will admit of two constructions, they should receive that which is consistent with the power given, and not that which is in violation of it. *Ib.*
7. Where one Board of Commissioners, in the execution of their duties, were required to report in writing to another Board of Commissioners, who thereupon were to do certain acts; and these boards were subsequently united without any change being prescribed as to the mode of discharging the trusts formerly confided to each of them, the formality of a written report as above directed, was necessarily dispensed with. *Ib.*
8. Under the 13th section of the Ordinance of the 9th March, 1807, the City Commissioners and Commissioners of Health, were required to form a positive and decided opinion that "a nuisance exists" in some "street, lane, or alley in the City of Baltimore, which will endanger the health thereof."—An entry in their books of their decision is not required. Certificates in their warrants, which they are directed

L. CORPORATIONS.—*Continued.*

issue for the collection of the tax imposed to remove the nuisance, the existence of the nuisances and of their characters would be sufficient; but where they say in each warrant that they conceive a street mentioned, to be in a state of nuisance, which might endanger the health of the city, thus referring to the health of the city generally, not to that of a particular part, it is not such an opinion as the ordinance requires, and the tax imposed under it cannot be enforced. *Ib.*

SUMPSIT, 4.

K, 2.

AND SLAVES.

a devise in the following words, viz: "likewise my negro man Charles to be free on the 1st day of January, 1827, on condition that he pay the sum of ten dollars annually, to my before named sister so long as he lives;" it was the intention of the testator, who died in 1825, that the slave mentioned in the devise should be free on the 1st January, 1827; and it could not have been his intention at the condition mentioned, should have been performed by Charles, precedent to that day, as the acts to be done consist of payments to be made by him annually, as long as he may live. *Miller vs. Negro Charles*, 210.

on a petition for freedom by a negro claiming his right to manumission, under a last will and testament, against the executor of the deceased master, the parties agreed upon a statement of facts which did not disclose whether the testator left assets sufficient for the payment of his debts or not; held that the objection to the manumission arising from the insufficiency of assets was not before the court. *Ib.*

QUITY, 20, 21.

FE.

MUNICIPAL CORPORATIONS, 5, 8.

ON.

QUITY.

ING.

QUITY, 6, 9, 12, 13, 14, 15, 17, 25, 26, 27, 37, 47, 48, 49.

PROMISSORY NOTES, 5, 8.

FE.

OND, 3.

QUITY, 2, 3, 37, 50.

AL AND AGENT.

SHIPPING, 5, 7.

PROMISSORY NOTES.

The Statute 3rd and 4th Anne, ch. 9, declares that promissory notes shall be assignable or endorsable over in the same manner as inland bills of exchange are, or may be, according to the custom of merchants; and power is by the same statute given to endorse drawers, or prior endorsers of such notes.

PROMISSORY NOTES.—*Continued.*

notes, in the same manner as in cases of inland bills of exchange.
Bowie vs. Duvall, 59.

2. By this statute, bills of exchange and promissory notes are placed on the same footing, and the law applicable to bills, is in general applicable to promissory notes. *Ib.*
3. Where it appeared that the note of the defendant, payable to B. or order, had been endorsed as follows, "I assign the within for value received, to L.;" signed B. but which endorsement was erased just before the jury was sworn; it was *held* that an action in the name of B. originally instituted for the use of L. could not be maintained, upon the note, as there was no evidence from which the jury could infer that the payee and plaintiff was the holder of the note; neither could an action be maintained on the money counts, although there was proof of an express promise to pay the sum demanded in such suit, as that must be considered as enuring to the benefit of him who had a right to the note. *Ib.*
4. If a note duly endorsed in full, should, in the regular course of commercial dealing, come back to the hands of a prior endorser, or of the payee, it would be competent for such person as the holder, to strike out the endorsement, and sue in his own name. *Ib.*
5. In an action against the maker of a note, payable at the house of the payee and plaintiff, on a certain number of days after date, no demand of payment is necessary to be averred or proved. *Ib.*
6. The endorsee of a bill of exchange is alone entitled to maintain an action on the same. *Ib.*
7. The endorsement of T. on the promissory note of E. payable to A. as follows: "I hereby guarantee the ultimate payment of the within note," is void for want of consideration; and under the plea of *non assumpsit* to a declaration founded upon that guaranty, the objection to the want of consideration may be taken. *Aldridge vs. Turner*, 227.

RENT.

See LANDLORD AND TENANT.

REPLEVIN.

Where in replevin the defendants avowed for rent in arrear due to them as executors of C. from the plaintiff as tenant, to their testator, it was *held*, that no question as to the right of the avowants as executors of C. to make a distress for rent falling due under a demise to him, either before or after his death arose upon the record; that whether the distress was made in due time or not, was not in issue by the pleadings, and that the instruction of the County Court in favor of the plaintiff was erroneous. *Chappellear vs. Harrison*, 263.

RIGHT OF WAY.

1. Where a certain instrument executed under the hand and seal of the owner of the land, was held to be a grant of an incorporeal hereditament, a right of way *de novo*, which would endure until both parties agree upon its discontinuance, and which must be acknowledged, and recorded according to our Acts of registration. *Hays vs. Richardson*, 195.

OF WAY.—*Continued.*

A right of way *in esse* may pass by deed of bargain and sale, duly acknowledged and recorded. *Ib.*

A transfer of way *de novo* may be by grant or lease, but cannot be effected by way of bargain and sale. *Ib.*

A right of way may be said to lie in the county where it exists, or is exercisable. *Ib.*

2 EQUITY, 18, 20, 21, 51.

EXECUTION, 2, 4.

ING.

The owner of a ship and cargo has the uncontrolled power of breaking up, or changing the voyage. *Pawson vs. Donnell*, 1.

The principles which should govern such cases, in the absence of all commercial usage on the subject, and by which the effect of its action on the contract of the ship master or supercargo with the ship owner, is to be determined, are:

1st. If by the exercise of this privilege a special injury is done to either, the ship owner must bear the loss, and make a reasonable indemnity.

2nd. If by the change of the voyage, the captain or supercargo be necessarily discharged from the performance of all the duties, for which a remuneration has been stipulated, his claim to such remuneration is thereby extinguished.

3rd. If a part of the duties have been executed, then such a proportion of the stipulated compensation should be allowed, as appears just on comparing the services rendered, with those which remain unperformed. For the interpolated part of the voyage, the usual compensation must be paid. The parties should be placed, as nearly as may be, in the same condition in which they would have stood, had a previous contract for the voyage as changed, been entered into between them. To all the customary emoluments of a captain, or supercargo, on such a voyage, are those officers respectively entitled. *Ib.*

A ship master, who was also the supercargo, was directed to proceed with his ship to several ports; his compensation, in addition to monthly wages, was a sum certain, with a privilege of bringing home a specified quantity of merchandise from one of such ports. After a part performance of the voyage, the ship owner changed its direction, and shortened it; so that the port at which the privilege might have been exercised, was not visited by the ship; before the termination of the voyage, the ship master died. HELD, that the privilege was so inseparably connected with the vessel's destination to the particular port, at which it was to have been exercised, that upon its ceasing to be one of the *termini* of the voyage, the privilege of necessity expired, and that the sum certain stipulated to be paid the captain had relation to the voyage as originally contemplated, and was therefore subject to abatement, in the discretion of the jury. *First*, for the alteration of the voyage, if they believed, that the ship master's labor and responsibility were thereby lightened;

SHIPPINO.—*Continued.*

- and, *secondly*, for that portion of his contemplated services, which were lost by his death. *Ib.*
4. The misconduct of a captain or supercargo, which produces neither injury nor inconvenience to his employer, forms no defence to the payment of his wages. *Ib.*
 5. The consignees selected by a ship master or supercargo in a foreign port, according to the usual course of trade, and in good faith, are so far the agents of the owners of the ship and cargo, that upon the death of the captain or supercargo, his representatives are not responsible for the consequences of the neglect or misconduct of such consignees, in the execution of their agency after his death not imputable to instructions given in the life of such captain or supercargo. *Ib.*
 6. A shipment of merchandise, whose exportation is prohibited, made by a supercargo for account of his principal, is at his own risk, and if seized and condemned at the place of exportation, the supercargo must bear the loss. *Ib.*
 7. The acceptance by a ship owner of the letters and invoices sent to him by the consignees of his ship in a foreign port, is not such a ratification of the acts of those agents, as would throw a loss arising from the seizure of merchandise exported against the laws of the port of shipment by them, for his account, upon such ship owner. *Ib.*

See FREIGHT.

STATUTES.

I. ACTS OF ASSEMBLY.

- 1715, c. 47. *Hays vs. Richardson*, 195.
 1745, c. 9. *Giraud vs. Hughes*, 115.
 1766, c. 14. *Hays vs. Richardson*, 195.
 1788, c. 24. *Giraud vs. Hughes*, 115.
 1785, c. 46. *Dyer vs. Dorsey*, 238.
 1796, c. 68. *Dugan vs. Mayor, &c. of Balto.* 280.
 1825, c. 103. *Clarke vs. Belmear*, 240.

II. BRITISH STATUTES.

- 8d and 4th Anne, c. 9. *Bowie vs. Duvall*, 59.

III. CONSTRUCTION AND EFFECT.

1. A consistent and uniform practice under various Acts of Assembly, passed in relation to the same subject, so fully establishes the contemporaneous construction of the first Act in the system, that after twenty years, it has too long obtained, to be shaken and disturbed. *Kiersted vs. State*, 101.
2. The Acts of Assembly of 1715, ch. 47, and 1766, ch. 14, being in *pari materia*, must be construed together as one system. The first having embraced incorporeal tenements, and hereditaments, there is no reason why they should be excluded from the second. The Act of 1766, cannot be confined to conveyances only by which the land itself passes, for the design was, that all rights, incumbrances, or conveyances, touching, connected with, or in any wise concerning land, should appear upon the public records. *Hays vs. Richardson*, 195.
3. If contradictions or incongruities exist between the preamble, and enacting clause of a statute, the latter shall prevail. *Ib.*

JTES.—(continued.)

A cotemporaneous, unvarying construction of an Act of Assembly, for sixty years, ought not to be disregarded but upon the most imperious and conclusive grounds. *Ib.*

RCARGO.

: SHIPPING.

The imposition and assessment of a tax by the Mayor and City Council of Baltimore, under and in pursuance of their charter, creates a legal obligation to pay such tax, on which the law raises an implied assumpsit by the person taxed. *Dugan vs. Mayor, &c. of Balto.* 280.

By the charter of the City of Baltimore, (Act of 1796, ch. 68, sec. 10,) it is provided "that the person or persons appointed to collect any tax imposed in virtue of the powers granted by this Act, shall have authority to collect the same by distress, and sale of the goods, and chattels, of the person chargeable therewith," and by the ordinance of the corporate authorities of that city of the 27th March, 1817, a tax was imposed, and the collector directed to deliver to each taxable person, an account of his assessment and tax in writing, before a given day; and if the tax should not be paid within a month thereafter, to proceed without delay to recover it agreeably to the mode prescribed by the Act of Incorporation. In an action brought by the Mayor and City Council of Baltimore to recover a tax imposed by the Ordinance of 1817, it was held unnecessary to prove, that the collector had delivered the account before mentioned to the defendant; and that his liability to be sued, in no manner depended upon the diligence or negligence of the collector. *Ib.*

ASSUMPSIT, 4.

EVIDENCE, 4.

MUNICIPAL CORPORATIONS, 1, 2, 3, 4, 8.

ER.

LANDLORD AND TENANT, 1.

S AND TRUSTEES.

BOND, 4.

EQUITY, 16, 19, 22, 31.

EXECUTORS AND ADMINISTRATORS, 2.

RS AND WATER-COURSES.

EJECTMENT, 2, 3.

IVES.

: Port Wardens of Baltimore by the Act of 1783, ch. 24, were authorized to grant permissions to make wharves, but in order to vest a title in any such wharf, it is essential by the provisions of the Act of 1745, ch. 9, sec. 10, that the grantee should have completed it according to his permission. *Giraud vs. Hughes*, 115.

1.

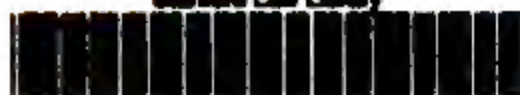
iere G. by his last will devised certain tracts of land to his three sons in fee, and also devised to his daughters, "the right, privilege and

WILLS.—*Continued.*

liberty of residing and living in the house with, and using and cultivating with themselves and their negroes, and of keeping their negroes, stock, and all their other property thereon, and with them, in common with my sons, all my lands during the term that my said daughters should remain single or unmarried," it was *held* that the daughters did not take an estate for life, or any other less estate, in common with their brothers, which was susceptible of partition: and that the devise to them was a mere charge for their benefit upon the lands of the testator, and incapable of alienation to a stranger. *Per* BLAND, Chan. *Warfield vs. Gambrill*, 288.

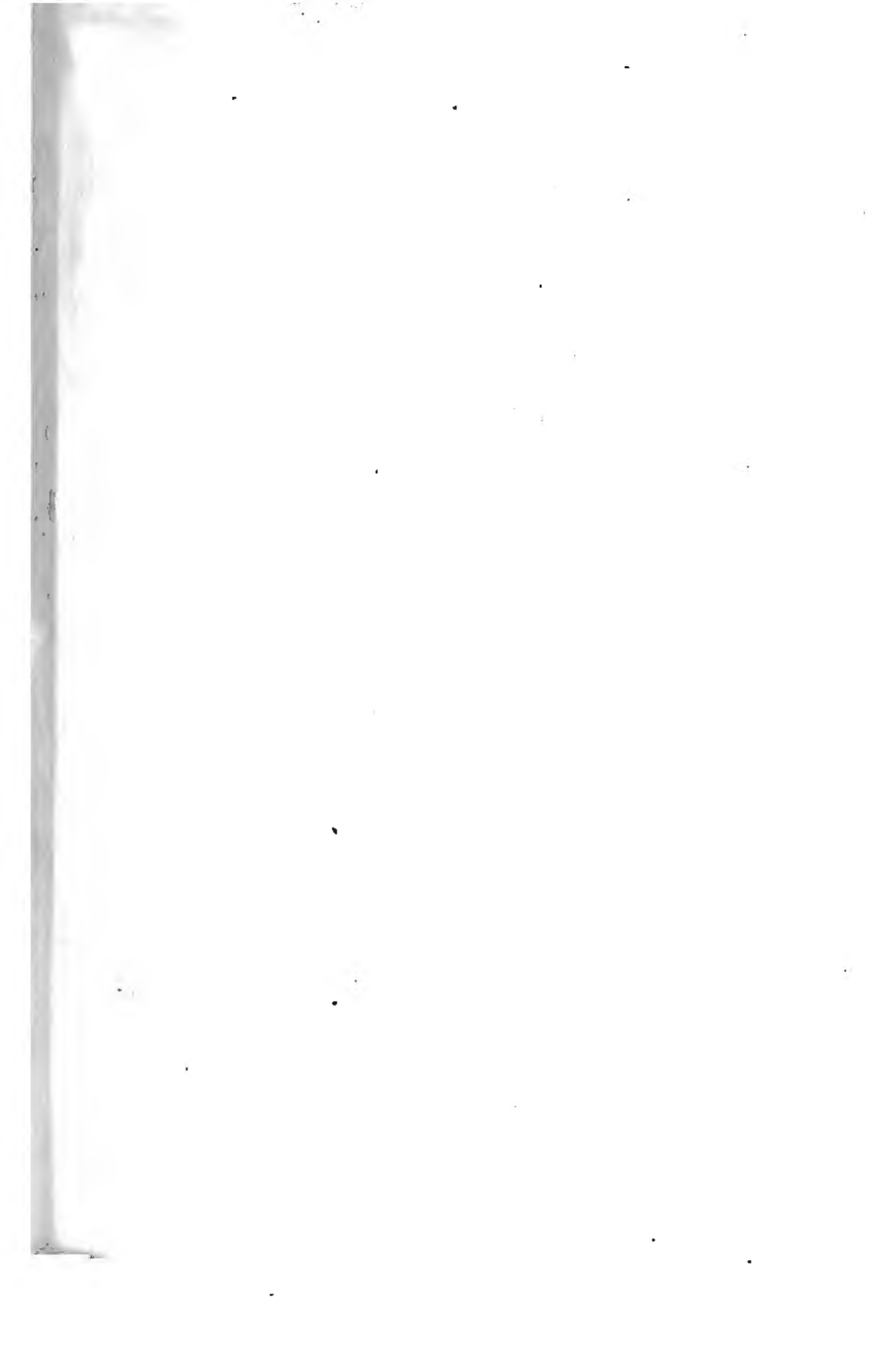
See NEGROES AND SLAVES, 1, 2.

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